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Solving the Free Exercise Dilemma: Free Exercise as Expression

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The Jehovah's Witnesses cases of the 1930's and 1940's conclusively established that the freedoms of religious exercise and expression are not mutually exclusive.[1] Activities of the Witnesses undertaken as part of their religious mission were found protected as expression under the first amendment.[2] This alone is not surprising. Actions or laws often implicate more than one constitutional protection. What is surprising is the extent to which the freedom of expression guarantee has pervaded the area of religious exercise. Activities such as prayer,[3] worship, and even matters of religious conscience,[4] which one might think would implicate only religious concerns, have been held to be protected by the freedom of expression in certain circumstances.

The Supreme Court has found no aspect of religion to be governed exclusively by the free exercise clause.[5] Indeed, the relationship between religious exercise and expression is so ex-

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1. *See infra* notes 170-82 and accompanying text.

2. *See, e.g.,* Murdock v. Pennsylvania, 319 U.S. 105, 108-10 (1943) (municipal ordinance requiring payment of license tax to distribute religious literature struck down); Jones v. Opelika, 316 U.S. 584 (1942), *rev'd,* 319 U.S. 103, 104 (1943) (tax on religious pamphlet distribution stricken); Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942) (statute prohibiting "fighting words" upheld against free speech and free exercise challenge by a Jehovah's Witness who had been convicted under the statute).

3. *See, e.g.,* Widmar v. Vincent, 454 U.S. 263, 269 (1981) (prayer protected as right of expression, requiring equal access to university facilities for religious student groups).

4. *See, e.g.,* Wooley v. Maynard, 430 U.S. 705, 714-15 (1977) (freedom of mind, or conscience, protected as right of expression).

5. Although the Court has extended a broader protection to religious conscience under the free exercise clause than under the free speech clause, it has not indicated that free exercise is the exclusive vehicle under which religious conscience may be protected. *Compare* Thomas v. Review Bd., 450 U.S. 707 (1981) *with* Wooley v. Maynard, 430 U.S. 705 (1977).

tensive that in nearly all cases in which the Court has sustained a litigant's religious objections to a religiously neutral law or regulation, it has done so with reference to freedom of expression. The Court has relied solely on the free exercise clause in only three cases.[6] Given this background, the suggestion is implicit that the Court should review all claims brought by religious proponents seeking exemption from laws of general applicability according to a free expression analysis, not an independent free exercise analysis.[7]

The Court has never explicitly adopted this approach. Nonetheless, three developments have emerged in first amendment jurisprudence that militate in favor of construing free exercise as a subspecies of expression. First, the Court's current treatment of free exercise issues has proved wholly unsatisfactory and has produced results which are unpredictable, inconsistent, and rife with inherent constitutional difficulties.[8] Second, the cases culminating in *Widmar v. Vincent*[9] suggest that the values and activities at the heart of free exercise are already protected as expression.[10] Consequently, extending greater protection to religious beliefs than to secular beliefs may not promote any substantial interest. Finally, religious concerns do not exist in a vacuum; they necessarily affect the values encompassed by the freedom of expression.[11] Recognition of this impact of religion in the society requires that religious freedom be placed on equal footing, both in definition and vitality, with secular rights of expression.[12]

This Article suggests that freedom of expression and free

6. Thomas v. Review Bd., 450 U.S. 707, 719-20 (1981); Wisconsin v. Yoder, 406 U.S. 205, 234-36 (1972); Sherbert v. Verner, 374 U.S. 398, 402-10 (1963).

7. Permitting exemptions to laws of general applicability only on the ground of free expression, even when the exemption is sought as a free exercise right, is not a significant limitation on the meaning of the free exercise clause. Its application as a basis for exception began in 1963 with Sherbert v. Verner, 374 U.S. 398 (1963), and has only been utilized by the Court in two instances since that time. *See* Thomas v. Review Bd., 450 U.S. 707, 720 (1981); Wisconsin v. Yoder, 406 U.S. 205, 234-36 (1972). For a definition of the role the free exercise clause may play under the restrictive approach posited in this Article, see *infra* notes 14-15 and accompanying text.

8. *See infra* notes 16-69 and accompanying text.

9. 454 U.S. 263 (1981).

10. *Id.* at 269. The Court stated: "[R]eligious worship and discussion . . . are forms of speech and association protected by the First Amendment." *Id.* *See also infra* notes 88-131 and accompanying text.

11. *See* Note, *Religious Exemptions Under the Free Exercise Clause,* 90 YALE L.J. 350, 369 (1980) (religious exemption has significant effects outside of religious spheres).

12. *See infra* notes 183-219 and accompanying text.

exercise provide a unitary protection for individual liberty. In short, whether an activity is protected by the first amendment should not turn on its being construed as religious or secular. Claims based on religion are not entitled to judicially created exemptions from laws of general applicability unless such exemptions are available to those advancing manifestations of secular ideas as well. This approach would require that no more stringent protection be allowed free exercise claims than would be granted to comparable secular activity.[13] Although the approach advocated in this Article effectively displaces or eliminates areas of protection arguably provided by the free exercise clause, the approach does not entirely eschew a role for the free exercise clause. The free exercise clause may still provide an important source of protection for religious autonomy,[14] and against laws that attempt to discriminate directly against religious practice.[15]

Part I of this Article evaluates the difficulties with the Court's current approach to the free exercise clause. Part II discusses *Widmar v. Vincent,* which, it is submitted, foreshad-

13. This principle may be illustrated by applying it to Wisconsin v. Yoder, 406 U.S. 205 (1972). In *Yoder,* Amish parents claimed that Wisconsin's compulsory education laws violated their free exercise rights, because the Amish faith forbids public education beyond eighth grade. *Id.* at 207-09. Under the test posited, the holding in *Yoder* granting exemption to religious adherents who opposed compulsory education could not be sustained unless such an exemption would be granted to those who opposed compulsory education on secular grounds, and only if the court determined that the manifestation of this dissent inhered of an aspect of expression.

14. Professor Laycock has described the right of religious autonomy as "the right of churches to make for themselves the decisions that arise in the course of running their institutions." Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy,* 81 COLUM. L. REV. 1373, 1394 (1981). A doctrine of religious autonomy, for example, recognizes the right of a church to settle disputes over control of church property, church organization, and entitlement to ecclesiastical office. *Id.* at 1394. The Supreme Court has on one occasion specifically identified a right to church autonomy as a free exercise right. *See* Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 100, 107-08, 115-16, 119-21 (1952). *See also* Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment,* 27 U.C.L.A. L. REV. 1195, 1210-14, 1230-45 (1980). Although church autonomy has usually been considered a component of the entanglement doctrine under the establishment clause, this view has been criticized. *See* Laycock, *supra* at 1416 ("[e]fforts to base the right [to church autonomy] on the establishment clause are mistaken, because that clause forbids support of religion, not interference with religion."). There appears to be no reason why the free exercise clause cannot provide an even broader grant of church autonomy than has yet been accorded. *See generally* Laycock, *supra.*

15. *See* McDaniel v. Paty, 435 U.S. 618 (1978) (Court struck down provision barring clergy from serving as delegates to state constitutional convention).

ows the approach advocated in this Article. Part III focuses on an array of Supreme Court cases to illustrate that the Court has already substantially subsumed the right of free exercise within its definition and application of the freedom of expression. Consequently, construing the free exercise clause as having no independent vitality in cases in which exemptions are sought from laws of general applicability is not a significant limitation on the meaning of the clause. In Part IV, the argument for a favored status for religious exercise vis-a-vis manifestations of other conscientiously held beliefs is rejected. The alternative approach offered by this Article, circumscribing protection of religious conscience within free expression parameters, is then explained and defended by reference to the case law and general principles of equal treatment.

I. THE DIFFICULTIES WITH THE COURT'S CURRENT APPROACH TO FREE EXERCISE

Since *Sherbert v. Verner,*[16] the Court has sporadically and inconsistently written religious exemptions into regulations of general applicability.[17] This process raises numerous constitutional problems, including problems of arbitrary application,[18] establishment of religion,[19] equal protection,[20] and definition.[21]

The tortuous path the Court has followed in its application of the free exercise clause is illustrated by two sets of irrecon-

16. 374 U.S. 398 (1963) (Seventh-Day Adventist granted an exemption to South Carolina law that denied unemployment benefits to plaintiff when she refused to work on Saturday because of her religion).

17. *See* Thomas v. Review Bd., 450 U.S. 707, 719-20 (1981); Wisconsin v. Yoder, 406 U.S. 205, 234-36 (1972); Sherbert v. Verner, 374 U.S. 398, 410 (1963). *See also* People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). *See generally* M. MALBIN, RELIGION AND POLITICS 39-40 (1978) (examining religious based exemptions); R. MORGAN, THE SUPREME COURT AND RELIGION 145-55 (1972); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court,* 24 VILL. L. REV. 3, 16-17 (1978) (criticizing religious exemption doctrine); Note, *supra* note 11, at 354 (present state of religious exemption doctrine is unclear).

18. *See* Note, *supra* note 11, at 355-56 (current exemption test is flawed and leads to "inconsistent and unprincipled decisions").

19. *See* Kurland, *supra* note 17, at 15-18 (Supreme Court has not reconciled exemptions based on religion); Note, *supra* note 11, at 356 (religious exemption doctrine has not yet adequately resolved establishment clause problems).

20. *See* Note, *supra* note 11, at 356 (free exercise protection may violate general notions of equal treatment).

21. *See* R. MORGAN, *supra* note 17, at 149-52 (court cannot identify a religious claimant unless it has a definition of religion); Weiss, *Privilege, Posture, and Protection: "Religion" in the Law,* 73 YALE L.J. 593, 622 (1964) (religious exemptions require the Court to become entangled in defining religion); Note, *supra* note 11, at 356-57 (courts have failed to define religion consistently).

cilable cases, *Wisconsin v. Yoder*[22] and *United States v. Lee,*[23] and *Sherbert v. Verner*[24] and *Braunfeld v. Brown*.[25] In *Yoder,* the Court exempted the Amish from Wisconsin's compulsory education laws on free exercise grounds.[26] Amish parents had been convicted of violating a Wisconsin law requiring children to attend school until age sixteen.[27] The parents claimed that their religion forbade school attendance beyond eighth grade, when the Amish way of life dictated that informal vocational training was necessary to prepare children for an agrarian lifestyle.[28] The Court found that Wisconsin's legitimate interest in the education of children was not sufficiently compelling to overcome the free exercise violation.[29]

More recently, in *United States v. Lee,*[30] the Court refused to grant exemption from the federal social security system to an Amish farmer and carpenter who objected that payment or receipt of public insurance benefits was forbidden by their faith.[31] The Court had no difficulty finding that the social security system's mandatory participation infringed upon the litigant's free exercise rights.[32] Nonetheless, the Court held that

22. 406 U.S. 205 (1972).

23. 455 U.S. 252 (1982).

24. 374 U.S. 398 (1963).

25. 366 U.S. 599 (1961).

26. 406 U.S. 205, 234 (1972).

27. *Id.* at 208-09. The respondents, members of the old order Amish religion, had declined to send their children, aged fourteen and fifteen, to public school after the children completed eighth grade. They were convicted of violating a compulsory school attendance law and fined $5 each. *Id.* at 207-08.

28. *Id.* at 209-10. Testimony at trial indicated the Amish parents believed their religion required their children to follow a life apart from the rest of the world and to make their living by farming. *Id.* at 210. The Amish objection to secondary education was based on their belief that their children would be exposed to impermissible worldly values, including competitiveness, worldly success and other values opposed to the Amish beliefs. *Id.* at 211.

29. *Id.* at 221-34. Although the Court's decision ultimately turned on free exercise grounds, it apparently rested in part upon the right of parents to direct the education of their children. *Id.* at 232-34.

30. 102 S. Ct. 1051 (1982).

31. *Id.* at 1054. Appellee had employed several Amish persons in his carpentry and farming businesses from 1970-1977. He refused to file the social security forms required of employers and to withhold social security taxes from his employees' paychecks. When the Internal Revenue Service assessed him with back employment taxes, he paid the first installment and then sued for a refund, charging that imposition of the taxes violated his and his employees' free exercise rights. *Id.* at 1053-54.

32. *Id.* at 1055. The Court noted that "[t]he Amish believe that there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system," and accepted the Amish contention that payment and receipt of social security taxes interfered with this obligation. *Id.*

free exercise did not require an exemption from the social security statute, because the governmental interest in providing public insurance was compelling.[33] Distinguishing *Yoder,* the Court stated, "[u]nlike the situation presented in *Wisconsin v. Yoder,* it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs."[34] Justice Stevens's concurrence viewed the majority's attempt to distinguish *Yoder* as unpersuasive: "The Court's attempt to distinguish *Yoder* is unconvincing because precisely the same religious interest is implicated in both cases and Wisconsin's interest in requiring its children to attend school until they reach the age of 16 is surely not inferior to the federal interest in collecting these social security taxes."[35]

Similar inconsistencies are present in the Court's treatment of *Sherbert v. Verner*[36] and *Braunfeld v. Brown*.[37] *Braunfeld* decided whether Orthodox Jewish merchants whose religion forbade Saturday work could be punished for violating the state's Sunday closing laws.[38] The Court refused to carve

33. *Id.* at 1056. "Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax." *Id.* The Court noted that the social security system serves the public good by providing a comprehensive insurance program for the old and disabled. Mandatory participation is imperative to maintain the program's fiscal integrity. *Id.* at 1055. The Court stated that the proper inquiry was whether accommodation of the Amish farmer's beliefs would unduly interfere with the government's interest. Concluding that it would, the Court stated that social security taxes were indistinguishable from general taxes and that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Id.* at 1056.

34. *Id.* at 1056.

35. *Id.* at 1058 n.3 (Stevens, J., concurring). The majority had intimated that the government's interest in maintaining a national tax system was somehow more compelling than Wisconsin's interest in compulsory education in *Yoder. Id.* at 1056. The majority also distinguished *Yoder* on the ground that exemptions to Wisconsin's compulsory education laws were somehow easier to accommodate than exemptions to the tax system. *Id.* Finally, the majority noted that if a religious exemption from social security were allowed, there would be no principled way to disallow a similar exemption from the national income tax system. *Id.*

36. 374 U.S. 398 (1963).

37. 366 U.S. 599 (1961).

38. *Id.* at 601-02. The case involved the constitutionality of a Pennsylvania criminal statute proscribing retail sales on Sundays. Appellants were Philadelphia merchants who sold clothing and home furnishings. According to appellants, the Orthodox Jewish faith required the closing of appellants' businesses and abstention from work from sundown Friday until nightfall on Saturday. They contended that they had previously remained open on Sundays to compensate for closing their businesses in observance of their faith on Saturdays, and that the Pennsylvania criminal statute proscribing Sunday retail sales

out an exemption for Sabbatarians,[39] and rejected the argument that the economic burden imposed on Sabbatarian merchants contravened the free exercise of religion.[40] The Court reasoned that mere inconvenience or competitive disadvantage to some religions was not sufficient to compel an exemption on free exercise grounds.[41]

In *Sherbert,* a Seventh-Day Adventist was discharged from her job because her religion prevented her from working on Saturdays.[42] Unable to find another employer who would accommodate her religious practices, Mrs. Sherbert applied for state unemployment compensation and was denied benefits because, under South Carolina's regulatory scheme, she had "refused suitable work when offered" and her refusal was not based on "good cause."[43] In holding that Mrs. Sherbert was en-

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worked an economic hardship on them in violation of their free exercise rights. *Id.*

39. *Id.* at 608-09.

40. *Id.* at 601-02, 608. The Court stated:

> Appellants contend that the enforcement against them of the Pennsylvania statute will prohibit the free exercise of their religion because, due to the statute's compulsion to close on Sunday, appellants will suffer substantial economic loss, to the benefit of their non-Sabbatarian competitors, if appellants also continue their Sabbath observance by closing their businesses on Saturday; that this result will either compel appellants to give up their Sabbath observance, a basic tenet of the Orthodox Jewish faith, or will put appellants at a serious economic disadvantage if they continue to adhere to their Sabbath.

Id. at 601-02. The appellants argued that free exercise justified an exemption to the Sunday closing law, but the Court rejected this suggestion because such an exemption might undermine the state's "goal of providing a day that, as best as possible, eliminates the atmosphere of commercial noise and activity." *Id.* at 608. The Court also cited enforcement problems with policing two days of rest instead of one, and the competitive advantage that would result to those religions allowed an exemption who would then have a virtual monopoly of sales on Sundays. *Id.* at 608-09.

41. *Id.* at 605-06. The Court stated that "the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive." *Id.* at 605.

42. 374 U.S. 398, 399 (1963).

43. *Id.* at 399-401. In a footnote, the Court made it clear that Mrs. Sherbert's reasons for refusing work were distinguishable from other personal reasons which the state could use as a basis for disqualification:

> It has been suggested that appellant is not within the class entitled to benefits under the South Carolina statute because her unemployment did not result from discharge or layoff due to lack of work. It is true that unavailability for work for some personal reasons not having to do with matters of conscience or religion has been held to be a basis of disqualification for benefits . . . . But appellant claims that the Free Exercise Clause prevents the State from basing the denial of benefits upon the "personal reason" she gives for not working on Saturday. Where the consequence of disqualification so directly affects First Amendment rights, surely we should not conclude that every "personal reason" is a basis for disqualification in the absence of explicit lan-

titled to unemployment benefits, the Court reasoned that the state law impermissibly forced her to choose between economic disadvantage and religious imperatives.[44] Contrary to the holding in *Braunfeld,* the Court created an exemption in the South Carolina law for those whose religion prevented them from working on Saturdays.[45] The strikingly incongruous results led Justice Stewart to remark: "[I] cannot agree that today's decision can stand consistently with *Braunfeld* v. *Brown* . . . ."[46]

In a similar vein, commentators have noted that the facts in *Sherbert* appear to parallel closely those in *Braunfeld.*[47] In both cases, the burdens imposed were of a similar character[48]—

guage to that effect in the statute or decisions of the South Carolina Supreme Court.

Id. at 401-02 n.4.

44. *Id.* at 404, 407. The Court stated: "The ruling forces her to choose between following the precepts of her religion and forfeiting benefits on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404. After determining that the regulations burdened Mrs. Sherbert's free exercise rights, the Court inquired whether that burden was justified by any compelling state interest and found none. *Id.* at 406-09. The Court rejected the possibility that spurious claims might dilute the state's unemployment funds, noting that the state would still be required to demonstrate "that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Id.* at 407.

45. The Court attempted to distinguish *Braunfeld,* asserting that the state interest in *Sherbert* in preventing spurious claims from depleting the unemployment funds was "wholly dissimilar" to the state interest which saved the *Braunfeld* statute:

> [The interest in *Braunfeld* was] in providing one uniform day of rest for all workers. That secular objective could be achieved . . . only by declaring Sunday to be that day of rest. Requiring exemptions for Sabbatarians . . . appeared to present an administration problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable.

Id. at 408-09.

46. *Id.* at 417. (Stewart, J., concurring).

47. *See* R. MORGAN, *supra* note 17, at 145-47 (*Sherbert* and *Braunfeld* cannot be reconciled); Ely, *Legislative and Administrative Motivation in Constitutional Law,* 79 YALE L.J. 1205, 1322 (1970); Pfeffer, *The Supremacy of Free Exercise,* 61 GEO. L.J. 1115, 1139 (1973) (impossible to reconcile the cases); Note, *supra* note 11, at 354 n.28 (the two cases have never been adequately reconciled).

48. Sherbert v. Verner, 374 U.S. 398, 417 (1963) (Stewart, J., concurring). Justice Stewart stated:

> The Court says that there was a "less direct burden upon religious practices" in that case [*Braunfeld*] than this. With all respect, I think the Court is mistaken, simply as a matter of fact. The *Braunfeld* case involved a state *criminal* statute . . . . The impact upon the appellant's religious freedom in the present case is considerably less onerous. We deal here not with a criminal statute, but with the particularized administration of South Carolina's Unemployment Compensation Act.

forcing the plaintiff to choose between economic disadvantage and religious duties.[49] In neither case did the government affirmatively compel any action which violated religious scruples.[50] Indeed, from this perspective, the statutory scheme upheld in *Braunfeld* seems more suspect. Religious considerations undoubtedly influenced passage of the Sunday closing law, while the unemployment compensation statute considered in *Sherbert* was wholly neutral.

In addition to these inconsistencies, the current religious exemption doctrine generates establishment clause questions when religious conduct is singled out for favored judicial treatment.[51] Justices Harlan and White emphasized the establishment problem in their *Sherbert* dissent.[52] Justice Harlan stated that because South Carolina law did not discriminate against Mrs. Sherbert on the basis of her religion, free exercise required no exemption.[53] Granting an exemption therefore raised establishment clause questions, because the state was required to "*single out* for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior (in this case, inability to work on Saturdays) is not religiously motivated."[54]

Id. (emphasis in original). *See also* R. MORGAN, *supra* note 17, at 147.

49. R. MORGAN, *supra* note 17, at 147.

50. *Id.*

51. This problem was noted most recently by Justice Stevens in United States v. Lee, 102 S. Ct. 1051, 1058 n.2 (1982). Concurring in the Court's decision to deny an exemption from the social security system to an Amish farmer who had raised a free exercise challenge, Justice Stevens said that the main reason for employing a strong presumption against such exemptions was "the risk that government approval of some [religious claims] and disapproval of others will be perceived as favoring one religion over another" in violation of the establishment clause. *Id.* (Stevens, J., concurring). *See* Ely, *supra* note 47, at 1313-14 (religion clauses restrict the government from favoring or disfavoring specific religions or religion generally); Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause,* 81 COLUM. L. REV. 1463, 1485 (1981) ("strict neutrality requires that the free exercise clause be subordinated to the establishment clause in every instance where the two doctrines are presently believed to conflict").

52. 374 U.S. 398, 422-23 (1963) (Harlan & White, JJ., dissenting).

53. *Id.* at 420 (Harlan, J., dissenting). Justice Harlan stated:

> Thus in no proper sense can it be said that the State discriminated against the appellant on the basis of her religious beliefs or that she was denied benefits *because* she was a Seventh-day Adventist. She was denied benefits just as any other claimant would be denied benefits who was not "available for work" for personal reasons.

Id. (emphasis in original).

54. *Id.* at 422 (emphasis in original). According to Justice Harlan, the occasions when a state would be constitutionally compelled to carve out an exemption to laws of general applicability would be few and far between. *Id.* at 423. Professor Laycock has also argued that the establishment clause objections to

Singling out religious groups for special treatment raises equal protection problems as well.[55] Allowing special treatment for some violates fundamental notions of equal treatment. One might well question, for example, why the Amish should be excluded from compulsory education laws with which all other groups, religious and secular, must comply. Although the free exercise clause obviously reflects a commitment to the protection of religious liberty, it is doubtful whether the concept of religion, as currently defined by the Supreme Court,[56] presents a rational classification for the protection of any fundamental interest.[57]

Still another difficulty created by religious exemptions is that a constitutional definition of religion and an inquiry into religious sincerity are necessary to determine who will be entitled to a special exemption.[58] Constitutional definitions have

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exemptions based upon the free exercise clause deserve to be taken more seriously. He observes that the result in *Sherbert* "was to make the taxpayers pay the costs of [the Sabbatarian's] religion, supplying her with the income that her religion precluded her from earning." Laycock, *supra* note 14, at 1414.

55. *See* Note, *supra* note 11, at 356.

56. The Court has attempted to distinguish religious beliefs from personal and philosophical beliefs without adequately defining either. *See, e.g.,* Thomas v. Review Bd., 450 U.S. 707, 713 (1980); Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972).

57. *See infra* text accompanying notes 211-14. Justice Douglas warned, in a case involving the interpretation of "religion" for the purpose of determining conscientious objector status under the Military Selective Service Act of 1967, that any interpretation of the religion clauses that favored religious beliefs over similarly principled nonreligious beliefs would result in "invidious discrimination" violative of equal protection doctrine. *See* Gillette v. United States, 401 U.S. 437, 469 (1971) (Douglas, J., dissenting).

58. *See generally* R. MORGAN, *supra* note 17, at 149-52 (court cannot identify a religious claimant unless it has a definition of religion); Weiss, *supra* note 21, at 622 (allowing religion based exemptions forces courts to become impermissibly enmeshed in defining what is religious); Note, *supra* note 11, at 356-57 (religious exemption unfairly favors one type of conscience over others).

The need for a sincerity test became especially acute in light of the religious exemption carved out for the unemployment compensation claimant in Sherbert v. Verner, 374 U.S. 398 (1963). *See* Killilea, *Standards for Expanding Freedom of Conscience,* 34 U. PITT. L. REV. 531, 548 (1973) (without a sincerity test, religious exemptions would be unmanageable and unsupportable because there would be no way to distinguish between conscientious and fraudulent claims).

The sincerity test has been used most often in cases in which the free exercise clause could easily have been abused by fraudulent claims. Claims have been denied for lack of a sincerely held belief where claimants sought religious exemptions from drug laws, *see* United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968); People v. Crawford, 69 Misc. 2d 500, 328 N.Y.S.2d 747 (1972), *aff'd,* 72 Misc. 2d 1021, 340 N.Y.S.2d 848; from school integration, *see* Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977), *cert. denied,* 434 U.S. 1063 (1978); from prison regulations, *see* Theriault v. Carlson, 495 F.2d 390 (5th Cir.), *cert. denied,* 419 U.S. 1003 (1974), *on remand,* 391 F. Supp. 578 (1975); from tax laws, *see*

proved elusive,[59] while the inquiry into religious sincerity has itself led to constitutional problems.[60] In *United States v. Ballard,*[61] the Court stated that any inquiry into the reasonableness of religious beliefs was constitutionally impermissible,[62] and that the only inquiry allowed is whether the claimant's religious beliefs are sincerely held.[63] The sincerity test illustrates the difficulty of defining religion. It is unclear, for example, whether sincerity should be determined by the length of time the claimant has held his or her beliefs[64] or by the various

United States v. Carroll, 567 F.2d 955 (10th Cir. 1977); from mental examinations, *see In re* Marriage of Gove, 117 Ariz. 324, 572 P.2d 458 (Ct. App. 1977); from unemployment compensation requirements, *see* Levold v. Employment Sec. Dep't, 24 Wash. App. 472, 604 P.2d 175 (1979); and military service, *see* United States v. Parker, 307 F.2d 585 (7th Cir. 1962), *vacated,* 372 U.S. 608 (1963).

59. For a catalogue of articles that have attempted to define religion under the religion clauses, see Note, *Toward a Constitutional Definition of Religion,* 91 HARV. L. REV. 1056, 1056 n.5 (1978). More recent articles that discuss definitions of religion include Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment,* 45 U. CHI. L. REV. 805, 829-42 (1978); Note, *supra* note 51, at 1478-79; Note, *supra* note 11, at 362-65.

Even if the approach suggested in this Article were adopted, problems in defining religion might still occur in establishment clause cases. *See* Malnak v. Yogi, 592 F.2d 197 (1979). Inquiry into the sincerity of one's religious beliefs would also be present in cases involving statutory grants of religious exemption. *See, e.g.,* United States v. Seeger, 380 U.S. 163 (1965).

60. Defining religion is inextricably related to the establishment clause and equal protection problems mentioned earlier. *See generally* Weiss, *supra* note 21, at 604 (defining religion may be impossible and attempts at definition may violate the establishment clause); Note, *Defining Religion: Of God, the Constitution and the D.A.R.,* 32 U. CHI. L. REV. 533, 558 (1965) (any definition must avoid violating the first amendment, as by favoring some religions over others, and the fifth amendment, as by arbitrarily discriminating against some religions); Comment, *The Legal Relationship of Conscience to Religion: Refusals to Bear Arms,* 38 U. CHI. L. REV. 583 (1971) (criticizing sincerity test for religion).

61. 322 U.S. 78 (1944).

62. *Accord* Wisconsin v. Yoder, 406 U.S. 205, 223-24 (1972).

63. *Ballard* involved the trial of leaders of the "I Am" Movement for mail fraud. The defendants allegedly falsely represented divine revelations and supernatural powers in an attempt to gain adherents and money. 322 U.S. at 79. At trial, the judge, realizing that the truth of the defendants' beliefs could not be submitted to the jury as an issue, instead framed the issue as whether the defendants made their representations in good faith. *Id.* at 81. The Supreme Court sanctioned this approach, and reaffirmed the principle that the verity of one's religious beliefs is not open to question. *Id.* at 86.

64. *See* Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 313 (5th Cir. 1977), *cert. denied,* 434 U.S. 1063 (1978) (private school policy against integration was formulated "closely on the heels" of public school integration); United States v. Corliss, 280 F.2d 808, 811 (2d Cir.), *cert. denied,* 364 U.S. 884 (1960) (conversion to Jehovah's Witnesses religion just prior to scheduled induction into armed forces); Teterud v. Gillman, 385 F. Supp. 153, 157 (S.D. Iowa 1974), *aff'd sub nom.* Teterud v. Burns, 522 F.2d 357, 361 (8th Cir. 1975) (religious conversion of "recent vintage" was an inconclusive factor in assessing sincerity). *See also* R. MORGAN, *supra* note 17, at 150.

methods the claimant uses to express those beliefs.[65] If judges choose to test sincerity by examining religious practices, the result is bound to favor orthodox religions with standard rituals of worship over the less orthodox believers whose worship is less ritualized or less observable.[66] The defects of testing for

65. *See* R. MORGAN, *supra* note 17, at 150. For instance, must the claimant's practices be recognized as central to his religion? Centrality is a concept that has been closely linked to the sincerity inquiry. Tribe has described centrality as "the element of how central or essential to the religion is the practice affected by the prohibition or requirement." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-11, at 862 (1978).

The Supreme Court first raised the centrality principle in Sherbert v. Verner, 374 U.S. 398 (1963), although it is questionable whether the Court there intended to promote centrality as a concept. In *Sherbert,* the Court mentioned that the Seventh-Day Adventist unemployment compensation claimant refused to work on Saturdays because doing so would violate "a cardinal principle of her religious faith." *Id.* at 406. Seizing on this language, the California Supreme Court announced the concept of centrality in People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). In *Woody,* the court held that statutes proscribing the use of peyote could not be constitutionally applied to Navaho Indians because use of peyote was central to religious ceremonies of their church. A long line of cases involving similar claims, put forth by more idiosyncratic defendants, have been rejected by distinguishing *Woody* on grounds of centrality. *See, e.g.,* Leary v. United States, 383 F.2d 851, 861 (5th Cir. 1967), *rev'd on other grounds,* 395 U.S. 6 (1969) (marijuana not central to practice of Hinduism); People v. Crawford, 69 Misc. 500, 508, 328 N.Y.S.2d 747, 755 (1972), *aff'd,* 72 Misc. 2d 1021, 340 N.Y.S.2d 848 (1973) (use of LSD and marijuana not central to church of Missionaries of the New Truth); People v. Collins, 273 Cal. App. 2d 486, 487, 78 Cal. Rptr. 151, 152 (1969) (marijuana not indispensable to religion, but merely constituted an artificial means to intensify communications with Supreme Being).

Centrality was rejected as a free exercise requirement, however, in Thomas v. Review Bd., 450 U.S. 707 (1981). In *Thomas,* the Court held that a Jehovah's Witness could not be denied unemployment compensation for refusing to work in an armaments factory in contravention of his religious conscience. In denying the petitioner's claim, the Indiana Supreme Court had found it significant that another Jehovah's Witness had no religious objection to working in the factory, and thus described the claimant's belief as a "personal philosophical choice rather than a religious choice." Thomas v. Review Bd., — Ind. —, 391 N.E.2d 1127, 1131 (1979) (quoted in Thomas v. Review Bd., 450 U.S. at 714). The United States Supreme Court disagreed with the legal significance of that finding, reasoning as follows:

> One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and *the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.*

450 U.S. at 715-16 (emphasis added). The Court concluded that the claimant had terminated his position for religious reasons. *Id.* at 716. The significant fact for free exercise purposes, therefore, was that Thomas's actions were religiously motivated, and it did not matter whether producing tank turrets was central to his Jehovah's Witness religion.

66. In his dissent in *Ballard,* Justice Jackson observed that "any inquiry into intellectual honesty in religion raises profound psychological problems . . . . When one comes to trial which turns on any aspect of religious belief or

sincerity of religious beliefs would not be obviated by accepting the claimant's word. A mere assertion of sincerity, without proof, would make the exemption available to anyone who chose to claim it, the unscrupulous as well as the scrupulous.[67]

Because of these difficulties within free exercise jurisprudence, the free exercise clause has received considerable attention from various commentators.[68] The literature that focuses on the free exercise problem, however, tends to ignore the free speech clause despite the fact that the two clauses may be inextricably bound.[69]

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representation, unbelievers among his judges are likely not to understand and are almost certain not to believe him." 322 U.S. at 93. Of course, the less orthodox or familiar the religion, the less likely it is to be understood and believed by the trier of fact.

The Court has never been comfortable with adjudicating the sincerity of religious beliefs. Chief Justice Warren's majority opinion in Braunfeld v. Brown, 366 U.S. 599 (1961), is illustrative. "[A] state-conducted inquiry into the sincerity of the individual's religious beliefs [is] a practice which a state might believe would itself run afoul of the spirit of constitutionally protected religious guarantees." *Id.* at 609 (footnote omitted). In a similar vein, the practical limitations of the sincerity test were recognized by Justice Marshall in a conscientious objector case, Gillette v. United States, 401 U.S. 437 (1971):

> The particular complaint about the war may itself be "sincere," but it is difficult to know how to judge the "sincerity" of the objector's conclusion that the war *in toto* is unjust and that any personal involvement would contravene conscience and religion. To be sure we have ruled . . . that "the 'truth' of a belief is not open to question"; rather, the question is whether the objector's beliefs are "truly held." But we must also recognize that "sincerity" is a concept that can bear only so much adjudicative weight.

Id. at 457 (citations omitted). *See also* R. MORGAN, *supra* note 17, at 152 (examining religious practices to determine sincerity would result in discrimination against unorthodox believers, ". . . just the sort of person whose behavior the free-exercise is presumably being expanded to protect").

67. In the words of Tribe, "a showing [of sincerity] is necessary if the concept of required accommodation [of religious practices] is not to become a limitless excuse for avoiding all unwanted legal obligations." L. TRIBE, *supra* note 65, § 14-11, at 859 (footnotes omitted).

68. *See, e.g.,* Choper, *The Religion Clauses of the First Amendment: Reconciling The Conflict,* 41 U. PITT. L. REV. 673 (1980); Clark, *Guidelines for the Free Exercise Clause,* 83 HARV. L. REV. 327 (1969); Emerson, *First Amendment Doctrine and the Burger Court,* 68 CAL. L. REV. 422 (1980); Kurland, *supra* note 17; Merel, *supra* note 59; Pfeffer, *supra* note 47; Weiss, *supra* note 21; Note, *supra* note 11.

69. *See* Clark, *supra* note 68, at 336 (justifications for religious freedom duplicate those for freedom of speech); Merel, *supra* note 59, at 816, 820-22 (free exercise right is coexistent with free speech right).

II. *WIDMAR v. VINCENT*: DEVELOPING A DOCTRINAL UNDERSTANDING OF RELIGIOUS EXERCISE AS EXPRESSION

In *Widmar v. Vincent*,[70] the Court provided the foundation for a doctrinally sound analysis of the interrelationship between the free exercise and free speech clauses of the first amendment. In addition, the Court may have unknowingly planted the seeds for developing a way to avoid the problems of judicially created religious exemptions based on the free exercise clause that began with *Sherbert v. Verner*.[71]

On its face, *Widmar* was not a difficult case. A student religious group, Cornerstone, was denied permission to conduct its meetings in university buildings. Cornerstone's meetings consisted of prayers, hymns, Bible commentary, and discussion of religious views and experiences. The university based its denial on its regulation which prohibited the use of university grounds and buildings for religious worship or religious teaching.[72] Because the university's buildings were available for meetings of nonreligious organizations, the Court found the challenged regulation was a classic example of a content based regulation of freedom of speech, and therefore supportable only by a "compelling" state interest.[73] The university's as-

70. 454 U.S. 263 (1981).

71. 374 U.S. 398 (1963). *See supra* text accompanying notes 42-46.

72. The university excluded religious groups from using campus facilities after the university's Board of Curators adopted a regulation in 1972 prohibiting prayer and religious worship, "a policy required, in the opinion of the Board of Curators, by the Constitution and laws of the State . . . ." 454 U.S. at 266 n.3.

73. A compelling state interest in public, elementary and secondary school cases may be the first amendment's anti-establishment mandate. *See, e.g.*, Karen B. v. Treen, 653 F.2d 897, 902-03 (5th Cir. 1981), *aff'd*, 102 S. Ct. 1267 (1982); Brandon v. Board of Educ., 635 F.2d 971, 978-80 (2d Cir. 1980), *cert. denied*, 102 S. Ct. 970 (1981); Wiley v. Franklin, 497 F. Supp. 390, 396 (E.D. Tenn. 1980). *Cf.* Colins v. Chandler Unified School Dist., 644 F.2d 759, 763-64 (9th Cir. 1981).

In *Brandon*, the Second Circuit held that the establishment clause served as a compelling state interest sufficient to override the free speech and free exercise rights of students who had asked permission to hold prayer sessions at their high school before classes began each day. The court found there was no constitutional right to prayer on a high school campus, and the Supreme Court denied review shortly after deciding *Widmar v. Vincent*. The *Brandon* court stated, with respect to the students' free speech claim, that a high school is not a public forum and although political views can be expressed in a public school, the establishment clause served as a limitation on the right to air religious views on campus. 635 F.2d at 980.

In *Treen*, an establishment clause violation was found when a state statute allowed a teacher to ask if any student wanted to pray to begin the class and if there were no volunteers, the teacher was permitted to pray for no longer than five minutes. Students not wishing to participate were excused. 653 F.2d at 899.

serted compelling interest, that the establishment clause mandated the regulation, was found unpersuasive.[74]

One might have thought that because prayer was at issue in *Widmar,* the Court would have grounded its opinion on free exercise doctrine. The intriguing aspect of the Court's holding, however, was that the case was decided according to a free speech analysis. First, free exercise would have been a narrower basis for decision. Second, the Court was faced with the argument that a holding on speech grounds would intrude on matters protected by free exercise. The university had maintained "that something is either within the reference" of the freedom of religion clause or the freedom of speech clause.[75] The Court squarely rejected this argument.[76]

Justice White dissented. According to White, if "religious worship *qua* speech is not different from any other variety of protected speech as a matter of constitutional principle . . . the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech."[77] The majority apparently was quite willing to take this step.[78]

The implications of *Widmar* are potentially significant. Be-

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Similarly, in *Wiley,* the court held that Bible study classes violated the establishment clause. 497 F. Supp. at 396.

In *Collins,* a high school parent charged that a school district violated 42 U.S.C. § 1983 when it permitted assemblies to begin with a communal prayer. School officials were enjoined against the practice on establishment grounds. 644 F.2d at 762-64.

74. 454 U.S. at 270-75. The Court stated: "The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech." *Id.* at 273. Any benefit accruing to the religious group through use of university facilities would be merely incidental and would not have the primary effect of advancing religion. *Id.*

75. Brief for Appellant, Widmar v. Vincent, 454 U.S. 263 (1981).

76. 454 U.S. at 269-70 n.6.

77. *Id.* at 284 (White, J., dissenting).

78. Indeed, the Court may have foreseen that despite the *Widmar* holding, it could still constitutionally prohibit prayer from the classroom because the establishment clause ban against state promotion of religion constitutes a compelling state interest. *See supra* note 73. As Justice White noted, the *Widmar* holding would sooner or later force the Court to reconsider such cases as School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) and Engel v. Vitale, 370 U.S. 421 (1962), which prohibited prayer (religious speech) from the classroom. 454 U.S. at 285 (White, J., dissenting). Justice White argued that prohibiting prayer in the schools on free exercise grounds would depend on a content based distinction between religious speech and other forms of speech, while under *Widmar,* religious speech is not distinguishable for purposes of free speech analysis. *Id.*

cause few activities are more profoundly religious than prayer, *Widmar* suggests that there is no core religious activity exclusively protected by the free exercise clause. Moreover, by relying on equal protection cases such as *Carey v. Brown*[79] and *Police Department of Chicago v. Mosley,*[80] the Court implied[81] that the religious aspects of the litigant's speech in *Widmar* would be constitutionally irrelevant to the litigant's claim. After *Widmar,* religious speech is speech—no more, no less. For example, if in *Widmar* there been no right of access to university buildings for groups engaging in nonreligious speech, there would be no right of access for those engaging in religious speech.[82]

Widmar thus leaves open significant questions with respect to free exercise jurisprudence. Does the free exercise clause protect matters other than those protected under the right of expression? Does the assertion of a free exercise right add weight to a claim that already involves the right of expression? The discussion that follows attempts to answer each of these concerns.

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79. 477 U.S. 455 (1980) (cited in *Widmar*, 454 U.S. at 270).

80. 408 U.S. 92 (1972) (cited in *Widmar*, 454 U.S. at 276).

81. Both *Carey* and *Mosley* presented challenges to ordinances which excepted labor picketing from a general ban on picketing in prescribed areas. In support of the ordinances, it was argued that in the prescribed areas labor picketing was more appropriate than other types of picketing. *See* 447 U.S. at 467-68; 408 U.S. at 100. In both cases, the Court rejected these challenges, reasoning that there is an "equality of status in the field of ideas," and thus selective exclusions from a public forum amount to impermissible censorship. *See* 447 U.S. at 463; 408 U.S. at 96. For a thorough examination of the Supreme Court decisions dealing with content based regulations, see generally Farber, *Content Regulation and the First Amendment: A Revisionist View,* 68 GEO. L.J. 727 (1980); Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions,* 46 U. CHI. L. REV. 81 (1978).

82. *See infra* notes 170-202 and accompanying text. *But see* Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 102 S. Ct. 970 (1981). The *Brandon* court affirmed a high school administration's denial of a student group's request to hold prayer sessions on campus, holding that the establishment clause served as a compelling state interest sufficient to override any infringement of the students' free speech rights. 635 F.2d at 980. The student group had argued that they merely sought "to exercise their rights to free speech in a public forum, unencumbered by governmental regulation of the context of their 'speech.'" *Id.* The court responded, "While students have First Amendment rights to political speech in public schools, sensitive Establishment Clause considerations limit their right to air religious doctrines." *Id.* (citations omitted). Distinguishing the lower court's opinion in *Widmar,* which was later affirmed by the Supreme Court, the *Brandon* court found that although religious speech could not be prohibited in a public forum, a high school was not a public forum. *Id.*

III. RELIGIOUS EXERCISE AS EXPRESSION

The free exercise clause protects three kinds of individual freedoms: freedom to engage in specific activities for religious purposes,[83] freedom to forego otherwise compulsory activities because of religious conscience,[84] and freedom of belief.[85] Interestingly, the Supreme Court has held that, to some extent, all of these freedoms come within the ambit of freedom of expression.[86] The last freedom requires little additional discussion. Freedom of belief has consistently been held to be protected by both the free speech and free exercise clauses.[87] The first two freedoms, however, require further analysis.

A. THE FREEDOM TO ENGAGE IN SPECIFIC ACTIVITIES FOR RELIGIOUS PURPOSES

Widmar v. Vincent[88] held that prayer is speech under the

83. *See, e.g.,* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (free exercise protects right to proselytize); McDaniel v. Paty, 435 U.S. 618 (1978) (free exercise protects freedom to engage in religious activities).

84. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972) (religious exemption from compulsory education); Gillette v. United States, 401 U.S. 437 (1971) (religious conscience basis for exemption from compulsory military service laws); Sherbert v. Verner, 374 U.S. 398 (1963) (exemption from state unemployment compensation law due to religious objection to sabbath work). *But see* United States v. Lee, 102 S. Ct. 1051 (1982) (no exemption from social security taxes where religious conscience prohibited receipt or payment of taxes). *See generally* Clark, *supra* note 68, at 336-44 (one value underlying the free exercise clause is protection of religious conscience); Laycock, *supra* note 14, at 1388-90 (conscientious objection to government policy protected by free exercise clause); Merel, *supra* note 59, at 811 (free exercise clause provides special protection for religious conscience).

85. *See* McDaniel v. Paty, 435 U.S. 618 (1978) (free exercise protects absolute freedom to believe).

86. *See, e.g.,* Widmar v. Vincent, 454 U.S. 263 (1981) (freedom of expression protects right to pray); Wooley v. Maynard, 430 U.S. 705 (1977) (broad freedom of thought protected by first amendment); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (freedom of expression prevents state imposition of affirmation of belief through compulsory flag salute).

87. *See* McDaniel v. Paty, 435 U.S. 618, 627 n.7 (1978); West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 640-42 (1943). Justice Jackson stated in *Barnette* that a Jehovah's Witness's refusal to salute the flag because of religious belief was protected under the free speech clause. The free speech clause prohibited the government's coercion of an individual's affirmation of belief, regardless of whether the belief was motivated by religion or other concerns. *Id.* Similarly, in Wooley v. Maynard, 430 U.S. 705 (1977), the Court invalidated a New Hampshire statute requiring a Jehovah's Witness to carry the message "Live Free or Die" on the license plate of his automobile. The Court reasoned that free speech protected against the compelled affirmation of belief. *Id.* at 715, 717. *But cf.* American Communications Ass'n v. Douds, 339 U.S. 382 (1950) (one who believes in violent overthrow of government may not hold union office).

88. 454 U.S. 263 (1981).

first amendment. This result is not very surprising; the Supreme Court has long recognized that a religious motivation for an activity does not automatically transfer the activity from the protections of the free speech clause into the exclusive domain of the free exercise clause. Indeed, beginning in 1938, a flurry of Supreme Court cases involving the religious activities of Jehovah's Witnesses, including solicitation, proselytizing, sales of religious literature, religious meetings and preaching, were decided on free speech grounds.[89] True, in an occasional case such as *Follett v. McCormick,*[90] the Court indicated, or at least hinted, that religious speech should be singled out for peculiar first amendment treatment.[91] Nonetheless, one may say fairly that the Jehovah's Witnesses cases established a wall of protection for the dissemination of ideas, of which religious ideas were just one variety.

That the vast majority of these cases were decided on grounds of free speech rather than freedom of religion is strong evidence that religious speech was accorded no special status. The Court apparently was concerned with protecting the activities because of their speech element rather than their religious elements.[92] *Lovell v. City of Griffin,*[93] the first successful first amendment challenge brought by the Jehovah's Witnesses, laid

89. For a comparison of the Court's utilization of the free speech clause to that of the free exercise clause in the Jehovah's Witnesses cases, see Kurland, *Of Church and State and the Supreme Court,* 29 U. CHI. L. REV. 2, 36-62 (1961); Pfeffer, *supra* note 47, at 1124-26.

90. 321 U.S. 573 (1944).

91. *Follett* involved a general tax imposed by a local government on the sale of books. The majority held that the tax could not be applied to a Jehovah's Witness who distributed religious materials from door to door in exchange for contributions. The Court reasoned that to do so would tax the exercise of religion. *Id.* at 578. Even at this early date, granting a religious exemption from an otherwise valid law was viewed by some as creating a tension between the free exercise and establishment clauses. The dissenters in *Follett* argued that an exemption only for religious book sellers subsidized religion. *Id.* at 580-83 (Roberts, Frankfurter & Jackson, JJ., dissenting). Although the *Follett* dissent did not explicitly characterize its objection as an establishment clause concern, as did Justice Stewart nineteen years later in his concurring opinion in Sherbert v. Verner, 374 U.S. 398, 413-17 (1963), the language is unmistakable: "In effect the decision grants not free exercise of religion, in the sense that such exercise shall not be hindered or limited, but, on the other hand, requires that the exercise of religion be subsidized." 321 U.S. at 581. The dissent also recognized the constitutional propriety of according parity to protection of religious and secular speech: "We cannot ignore what this decision involves. If the First Amendment grants immunity from taxation to the exercise of religion, it must equally grant a similar exemption to those who speak and to the press." *Id.* at 581-82.

92. Indeed, if the Court felt the religious elements were relevant, it should have rested its decisions on the narrower grounds of free exercise.

93. 303 U.S. 444 (1938).

the foundation for categorizing religious speech under a broad free speech umbrella. After being convicted under ordinances proscribing the distribution or sale of religious literature, the defendant attacked the ordinances, claiming violations of freedom of religion, freedom of speech, and freedom of the press.[94] The Court held that the ordinances infringed upon freedom of speech and of the press, but found no particular significance in the religious nature of the defendant's literature. The Court stressed only that the challenged ordinances infringed upon the dissemination of ideas.[95]

In cases after *Lovell*, in which the first amendment claims of Jehovah's Witnesses were rejected, the Court further implied that the religious content of speech is constitutionally insignificant. In *Cox v. New Hampshire,*[96] sixty-eight Jehovah's Witnesses were arrested for engaging in an "information march" without first obtaining a parade permit as required by local law. After extensive free speech analysis, the Court upheld the permit requirement as a reasonable time, place and manner regulation.[97] The freedom of worship argument was dismissed perfunctorily as "beside the point."[98] The Court provided a one sentence explanation: "No interference with religious worship or the practice of religion in any proper sense is shown, but only the exercise of local control over the use of streets for parades and processions."[99] In other words, a parade is a parade, and local authorities need not be concerned that the marchers carry a religious banner.

In *Martin v. Struthers,*[100] the Court also recognized the generic nature of speech, but in a more positive manner. A proselytizing Jehovah's Witness had been convicted for distributing religious tracts door to door in violation of a ban on all home solicitation. In overturning the conviction, the Court explained the importance of door to door solication to the free dissemination of ideas,[101] and concluded: "Freedom to dis-

94. *Id.* at 448.
95. *Id.* at 451-52.
96. 312 U.S. 569 (1941).
97. *Id.* at 576.
98. *Id.* at 578.
99. *Id.*
100. 319 U.S. 141 (1943).
101. Once again the Court placed dissemination of religious and political ideas in one broad speech category:

> Many of our most widely established religious organizations have used this method of disseminating their doctrines, and laboring groups have used it in recruiting their members . . . . Of course, as every person acquainted with political life knows, door to door campaigning is one of

tribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that . . . it must be fully preserved."[102]

In *Saia v. New York,*[103] the Court again turned its attention to the nature of the activity in which the Jehovah's Witness was engaged, rather than the religious content of his message. The Jehovah's Witness in *Saia* had been convicted for failing to obtain a permit for a loudspeaker he used to amplify his preachings. His request for a permit had been refused because of others' complaints about noise. The Court invalidated the permit requirement as a standardless prior restraint.[104] Justice Douglas's majority opinion focused entirely on speech, expressing the concern that a standardless restraint on speech could be used arbitrarily to inhibit political as well as religious speech.[105]

In each of these cases, the Court focused on the nature of the activity and the importance of the activity in the free dissemination of ideas; the religious nature of the activities was only incidental.[106] Even though the activities in question in these cases were as integrally religious as preaching, worship, and proselytizing, the Court did not suggest that these religious components were significant, other than to show that through these activities ideas were being expressed. Indeed, the Court has never found an activity engaged in for religious purposes to be entitled to protection under the free exercise clause when that activity did not inhere with an aspect of expression.

This point was acknowledged by one of free exercise's most

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the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes.

Id. at 145-46 (citations omitted).

102. *Id.* at 146-47.

103. 334 U.S. 558 (1948).

104. *Id.* at 559-60.

105. Justice Douglas stated:

Loud-speakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. It is the way people are reached. Must a candidate for governor or the Congress depend on the whim or caprice of the Chief of Police in order to use his sound truck for campaigning?

Id. at 561.

106. The Court's reasoning in *Martin v. Struthers* particularly illustrates the irrelevance of the nature of the Jehovah's Witnesses' claims. *See supra* note 101. *But see* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development—Part I. The Religious Liberty Guarantee,* 80 HARV. L. REV. 1381, 1397-98 (1967) (free exercise claim added weight to Jehovah's Witnesses' claims).

eminent defenders, Leo Pfeffer, who in reviewing the cases prior to *Sherbert* stated:

> The chronicle can be summed up briefly and starkly: In every case in which a claim under the free exercise clause was upheld, it was bracketed with a free speech or free press claim; conversely, whenever free exercise stood alone it was unsuccessful. Realistically, free exercise did not have a separate but equal existence, or even one that was separate and unequal; it practically had no existence at all.[107]

Because the cases after *Sherbert* which found a unique existence for the free exercise clause did not involve activities undertaken for religious purposes, but the right to forego otherwise compulsory activities because of religious conscience,[108] Professor Pfeffer's analysis remains valid. Apparently, affirmative activites undertaken for religious purposes are protected only by rights of expression.

B. The Freedom to Forego Otherwise Compulsory Activities Because of Religious Conscience

The pertinent area in which the speech and free exercise clauses have not completely overlapped involves the right to forego otherwise compulsory activities because of religious conscience.[109] The Court has never protected religious conscience in all circumstances, however;[110] and, when it has recognized rights of religious conscience, it has been equivocal in deciding whether religious conscience is to be protected by the religious exercise clause or by the speech clause.[111] Occasionally, the

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107. Pfeffer, *supra* note 47, at 1130. Professor Kurland, however, argues that *Murdock v. Pennsylvania,* 319 U.S. 105 (1943), gave higher protection to religious literature than to other literature. P. Kurland, Religion and the Law 57 (1962).

108. *See infra* note 113.

109. As suggested earlier, the free exercise clause may have an independent vitality with respect to rights of religious autonomy and protection of religious exercise from nonneutral infringement. *See supra* notes 14-15 and accompanying text.

110. *See, e.g.,* Davis v. Beason, 133 U.S. 333 (1890) (bigamy and polygamy criminal although encouraged by Mormon church). *See generally* Giannella, *supra* note 106.

111. In vindicating rights of conscience under the speech clause, the Court has occasionally referred to the interest as one of freedom of mind. *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977). *Cf.* Prince v. Massachusetts 321 U.S. 158 (1944). Use of the term "freedom of mind" is somewhat unfortunate because of its imprecision. Nonetheless, the phrase is useful as a shorthand expression of the principles embodied in *Wooley*. "Freedom of mind" can be taken to mean freedom from having the government compel people to express something they do not believe in, even when they would not likely be identified as supporting the message expressed. "Freedom of conscience" can be taken to mean freedom from having the government force people to do some things they feel are deeply wrong. Thus, freedom of mind can be viewed as one kind of freedom of

Court has preserved religious conscience on the grounds of secular rights of expression and association,[112] while in other contexts it has assured religious conscience on the basis of free exercise.[113] In addition, defining exactly what constitutes a religious conscience has been obscured by cases in which litigants have advanced what appear to be rights of secular conscience and the Court has found those rights to be protected by the free exercise clause.[114] Only three cases have sustained challenges to laws of general applicability solely under the free exercise clause on the ground that those laws violated the integrity of the litigant's religious beliefs.[115]

In sum, there is no question that both the free exercise and free speech clauses have been found to protect religious conscience. This section explores that development by considering contexts in which religious conscience has been treated as speech and secular conscience has been given the status of religion.

1. *Religious Conscience as Speech*

The Supreme Court has already recognized that the right to forego an activity or to refrain from engaging in an otherwise compulsory expressive activity because of religious principle is protected under the free speech clause. Two of the flag salute cases of the 1940's, *Minersville School District v. Gobitis*[116] and

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conscience. In this Article, the interest in foregoing activities because of conscientious objection will be described as freedom of conscience, regardless whether that objection is based on religious or nonreligious concerns.

112. *See, e.g.,* Wooley v. Maynard, 430 U.S. 705 (1977) (Jehovah's Witness's refusal to display state motto "Live Free or Die" on his license plate for religious, moral, ethical and political reasons protected by free speech clause); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (attack on compulsory flag salute requirement by Jehovah's Witness upheld on free speech grounds).

113. *See* Thomas v. Review Bd., 450 U.S. 707 (1981) (Jehovah's Witness granted exemption from unemployment compensation regulations because his religious beliefs prevented him from working in an armaments factory); Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish granted exemption from Wisconsin's compulsory education requirements on free exercise grounds); Sherbert v. Verner, 374 U.S. 398 (1963) (free exercise exemption to South Carolina's unemployment insurance program carved out for benefits claimant whose religion forbids Saturday work).

114. *See infra* notes 132-61 and accompanying text.

115. *See supra* note 113. It is interesting to note, however, that although the Court's discussion in those cases focused on the religious concerns of the challengers' claims, rights of expression were arguably at stake. *See infra* notes 205-07 and accompanying text.

116. 310 U.S. 586 (1940).

West Virginia State Board of Education v. Barnette,[117] and more recently, *Wooley v. Maynard,*[118] provide lucid examples. In *Gobitis,* Jehovah's Witnesses claimed that free exercise justified their children's refusal to salute the flag. Writing for the majority, Justice Frankfurter rejected the free exercise claim, reasoning that the school board's flag salute requirement did not impose any religious belief upon the children.[119] Justice Stone, in his famous dissent, advocated first amendment protection for a broad "freedom of thought" and argued that requiring a person to utter words which were profane to that individual was the worst form of coercion of belief.[120]

Three years later in *Barnette,* the Court overruled *Gobitis,* and came close to adopting Justice Stone's position when it invalidated an identical flag salute requirement on free speech grounds. Jehovah's Witnesses had argued that free speech should be construed to include the freedom not to speak utterances that were repugnant to the speaker.[121] Although the Witnesses' objection to the flag salute requirement was based on religion, the Court viewed the issue as protection of individual freedom of conscience, regardless of whether the objection was motivated by religious or other conscientiously held beliefs.[122] The majority characterized compulsory flag salutes as involving an "affirmation of a belief and an attitude of mind,"[123] and ex-

117. 319 U.S. 624 (1943).

118. 430 U.S. 705 (1977).

119. 310 U.S. at 594.

120. *Id.* at 604 (Stone, J., dissenting). One commentator said of Justice Stone's dissent: "[Stone] sought to extend to religious freedom litigation the circumstantial approach already in vogue in free speech cases. Beyond this, he tried to establish an absolute immunity for what he considered the underlying imperative of the First Amendment—freedom of thought in a broad sense." D. MANWARING, RENDER UNTO CAESAR: THE FLAG SALUTE CONTROVERSY 147 (1962).

121. Brief for Appellees, West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). The Jehovah's Witnesses' brief contained arguments based on both freedom of religion and freedom of speech. Arguing that the case could be decided on free speech grounds, counsel stated that the first amendment freedoms should receive equal treatment. He also argued that free speech should be construed to include the freedom not to speak repugnant utterances. For a discussion of all five briefs filed in the case, see D. MANWARING, *supra* note 120, at 215.

122. The Court stated:

> Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe the constitutional liberty of the individual.

319 U.S. at 634-35 (citations omitted).

123. *Id.* at 633.

plained: "We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control."[124]

As one author noted, *Gobitis* and *Barnette* may be construed as recognizing that freedom of religion and speech are "related parts of a sort of political 'freedom of conscience.' "[125] These two cases also demonstrate that a refusal to engage in a compulsory speech activity because of religious conscience is a free speech claim requiring no independent free exercise analysis.

The cases construing freedom of conscience, including religious conscience, as protected by the speech clause, coalesced in *Wooley v. Maynard*.[126] One of the claimants, George Maynard, had covered up the state motto, "Live Free or Die," on his license plates, because the motto conflicted with his moral, ethical, political, and religious beliefs.[127] After being convicted three times for defacing his license plates in violation of state law, Maynard sought to enjoin the enforcement of the statute. The Court found that Maynard had not intended to convey any ideas by refusing to display the motto on his license plate, but characterized the case as one involving a right of nonspeech,[128] the right not to say "Live Free or Die," and invalidated the statute.

The Court could have chosen to base its decision on the free exercise clause. After all, one of Maynard's arguments was that his religious freedom was infringed by the statute.[129] Instead, the Court held that compelling a person to become a vehicle for expressing a belief he or she finds objectionable invades a "sphere of intellect and spirit"[130] protected by rights

124. *Id.* at 642.

125. D. MANWARING, *supra* note 120, at 54-55.

126. 430 U.S. 705 (1977).

127. The Court recognized that the essence of Maynard's objections was that he found the message conveyed by the motto "Live Free or Die" "morally, ethically, religiously and politically abhorent." *Id.* at 713.

128. "We begin with the proposition that the freedom of thought protected by the First Amendment against state action includes both the right to speak freely *and the right to refrain from speaking at all*." *Id.* at 714 (emphasis added).

129. *See supra* note 127.

130. *Id.* at 717. The Court stated:

> [W]e are faced with a state measure which forces an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State "invades the

of expression. In effect, the *Wooley* case established a "right of conscience."[131]

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sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

Id. at 715 (quoting West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

131. The Court alluded to this in *Wooley*: "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" 430 U.S. at 714. *See supra* note 111. Explaining *Wooley* as resting on a purported alternative ground, specifically the right of non-speech, is attenuated. Maynard was no more forced to say "Live Free or Die" by having that motto on his license plate than an individual is forced to say "In God We Trust" every time he makes a cash purchase. As Justice Rehnquist pointed out, if Maynard was concerned with persons ascribing the quote "Live Free or Die" to him, all he needed to do was indicate by bumper sticker or some other means that he did not subscribe to the state motto. *See* 430 U.S. at 722 (Rehnquist, J., dissenting).

Describing *Wooley* as an expression case involving a right of nonspeech is even more difficult after *PruneYard Shopping Center v. Robbins,* 447 U.S. 74 (1980). In *PruneYard,* the Court held, based on the California Supreme Court's interpretation of state constitutionally protected rights of free expression and petition, that the state of California could require a shopping center owner to permit members of the public to use shopping center property as a forum for speech. *Id.* at 88. Justice Rehnquist, this time writing for the majority, attempted to distinguish *Wooley* on several grounds. Initially, he observed that the shopping center was not limited to the personal use of the owners as was the automobile that carried the state-mandated message in *Wooley*. Consequently, the views expressed by members of the public while speaking or distributing pamphlets would not likely be identified as those of the shopping center owners. In addition, he pointed out that California, unlike New Hampshire in *Wooley,* was not prescribing a specific message; the state was only requiring that others be able to disseminate whatever message they might have. Finally, Justice Rehnquist noted that the shopping center owners could publicly disavow any identification with the messages of speakers or pamphleteers by posting signs. *Id.* at 87.

These attempts to distinguish *Wooley* undercut *Wooley* as a case involving expression identifiable with the challengers, and hence as a case implicating a right of nonspeech. Justice Rehnquist's claim that the shopping center owners could readily disclaim sponsorship of any views expressed at the facility is hardly a ground to distinguish *Wooley*. In fact, the argument is the same one Rehnquist relied on in his *Wooley* dissent to find the absence of any compelled expression in that case. *See* 430 U.S. at 722 (Rehnquist, J., dissenting). Rather than distinguishing *Wooley,* the argument merely highlights what Justice Rehnquist perceived to be wrong with the *Wooley* majority's position in the first place: that automobile owners were not being compelled to express any particular message as long as they were capable of dissociating themselves from the message on the license plates. *Id.* at 720-22. Similarly, Justice Rehnquist's observation that because a shopping center is an establishment open to the public its owners will not be identified with the views expressed by members of the public who use it as a forum for speech also fails to distinguish *PruneYard* from *Wooley*. People are no more likely to believe that an automobile owner avows the message connected with a state's license plate motto than to believe that a shopping center owner sponsors the message of speakers or pamphleteers who use the shopping center facility. Finally, Justice Rehnquist's other ground for distinguishing the cases, that in *Wooley* the government itself prescribed the message, is useful only if people actually associated

Wooley and *Barnette* do not stand alone in establishing that the free exercise clause is not the exclusive guardian for rights of conscience. In three recent cases, the Court has extended a first amendment protection of conscience in wholly secular contexts. In *Abood v. Detroit Board of Education,*[132] the Court relied on the first amendment to strike down a state law which required nonunion public employees to contribute, as a condition of employment, to union political activities they opposed.[133] The Court held that this requirement violated the first amendment, although no claims of religious objection were involved.[134] The Court stated: "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the state."[135]

Of similar effect are *Elrod v. Burns*[136] and *Branti v. Finkel*.[137] In *Elrod,* Justice Brennan, writing for a plurality, held that a newly elected Democratic sheriff of Cook County had violated the constitutional rights of certain non-civil service employees by discharging them because they were not members

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the government's message with the automobile owner in *Wooley* and the speaker's or pamphleteer's message with the shopping center owner in *PruneYard*. But because the cases are nearly indistinguishable on free expression grounds—in both cases, either the public would not initially ascribe the messages to the owner of the automobile or to the owner of the shopping center, or the owners could easily dissociate themselves from the messages—the content of the expression involved cannot be used as a justification to differentiate them.

PruneYard thus requires that *Wooley* be read as something other than an expression case involving a right of nonspeech, because in both cases it is unclear whether the objectors were actually identified as expressing anything. In light of *PruneYard, Wooley* stands for the proposition that freedom of expression also protects a right to be free from governmental attempts to coerce beliefs by forcing individuals to express a message they do not believe in, even when others could not generally view them as identifying with that message. In short, these cases establish a sort of "freedom of mind." *See supra* note 111.

132. 431 U.S. 209 (1977).

133. *Id.* at 234-36. The Court pointedly distinguished Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956), which upheld a union shop clause that required financial support of the union's exclusive bargaining representative by its members. 431 U.S. at 215, 219. *Hanson* did not deal with the issue of whether members could be forced to contribute union dues used for ideological purposes. *Id.* at 219.

134. 431 U.S. at 234-35.

135. *Id.* Significantly, the Court remarked that the same "principles prohibit a State from compelling any individual to affirm his belief in God," and cited Torcaso v. Watkins, 367 U.S. 488 (1961), a case decided on free exercise grounds. Again, the merger of the speech and free exercise clauses is evident.

136. 427 U.S. 347 (1976).

137. 445 U.S. 507 (1980).

of the Democratic Party.[138] Noting that in order to retain their jobs, the sheriff's employees were required to pledge their allegiance to the Democratic Party, Justice Brennan concluded that the system inevitably tended to coerce employees into compromising their true political beliefs.[139] Citing, of all cases, *Sherbert v. Verner,*[140] the Court held that Cook County's patronage practice impermissibly conditioned a governmental privilege or benefit on protected activity in violation of the first amendment.[141]

More recently, in *Branti v. Finkel,*[142] the Court held that a newly appointed public defender could not dismiss two assistant defenders on the sole ground of their political beliefs.[143] Again, the protection of a person's right not to compromise his or her beliefs, the archetypal right of conscience, was found to implicate rights of expression.[144]

It is not submitted that cases such as *Wooley* and *Abood* establish a generalized right of conscience.[145] Specifically, the

138. 427 U.S. at 373. The defendants argued that the interest in patronage dismissals outweighed the first amendment values at stake. *Id.* at 363-73. The Court found the interests asserted insufficient, except to the extent that the interest in implementing policies sanctioned by the electorate justified patronage dismissals in policymaking positions. *Id.* at 372.

139. *Id.* at 357-60. Two cases were cited as "[p]articularly pertinent" in construing the first amendment freedom of political association as applied to patronage dismissals: Keyishian v. Board of Regents, 385 U.S. 589 (1967), and Perry v. Sinderman, 408 U.S. 593 (1972). *Keyishian* held unconstitutional statutes prohibiting public employment of members of subversive organizations.

140. 374 U.S. 398 (1963). *See supra* notes 42-54 and accompanying text.

141. 427 U.S. at 373.

142. 445 U.S. 507 (1980).

143. *Id.* at 519-20. The defendant attempted to characterize the role of assistant public defender as a policymaking position, fitting the patronage dismissal exception articulated by the plurality in *Elrod. See supra* note 138. This argument was rejected. The Court viewed the responsibility of an assistant public defender as implicating individual attorney-client relationships rather than a broad political policy function. 445 U.S. at 517-20.

144. 445 U.S. at at 513-17. In *Branti,* unlike *Elrod,* the party in power did not exact a "pledge of allegiance" in order to retain the job, but instead required that an employee be "sponsored" by the party. *Id.* at 512, 516-17. The defendants argued unsuccessfully that sponsorship involved a lesser degree of coercion than a switch in political affiliation, and thus encroached on first amendment values to a lesser degree. *Id.* at 516. The Court found this distinction unpersuasive, and stated that although sponsorship is a less blatant form of political coercion, it nonetheless falls within the first amendment proscription forbidding "the dismissal of a public employee solely because of his private political beliefs." *Id.* at 516-17.

145. The framers of the Constitution considered including explicit language in the first amendment to guarantee freedom of conscience. Several such proposals were submitted by various representatives to the Constitutional Convention. Congressman Livermore suggested: "Congress shall make no laws touching religion, or infringing the rights of conscience." 1 ANNALS OF CON-

Court has drawn the line for protecting secular conscience at the point where the objection stems from a desire to refrain from what might be termed a governmental attempt at coercing beliefs. In other words, the Court has established a sort of "freedom of mind"—[146] a concept which, as will be shown, is not far removed from what has been accorded protection as religious conscience.[147]

2. *Secular Conscience as Religion*

While the Supreme Court has been using definitions of speech to include expressive religious activities and rights of religious conscience, numerous cases suggest that the definition of religious exercise may include what are commonly regarded as more secular concerns. In two separate cases, for example, the Court has suggested, without discussion, that secular humanism is religion under the first amendment.[148] The more important case is *Torcaso v. Watkins,*[149] which expanded the free exercise clause to include nontheistic beliefs.[150] In *Torcaso,* the Court struck down a requirement that a notary public appointee profess his or her belief in God as a prerequi-

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GRESS 731 (Gales & Seaton eds. 1789). Ames similarly proposed: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." *Id.* at 766. A framer of the Bill of Rights, James Madison, earlier placed for consideration before the House: "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.* at 729. One legal scholar has concluded that the first amendment as written in the Constitution fully embodies the intent of the framers to protect the right of conscience, and the final wording which lacks explicit language protecting conscience signifies merely a change in form, not content. *See* Freeman, *A Remonstrance for Conscience,* 106 U. PA. L. REV. 806, 812-13 (1958).

Further, it has been suggested that, by stating a right of conscience separately from free exercise and disestablishment of religion, the framers implicated a right of conscience independent of religious conscience. *See* Comment, *supra* note 60, at 585 n.13.

146. *See supra* notes 111, 131.

147. *See infra* notes 203-19 and acompanying text.

148. *See* Welsh v. United States, 398 U.S. 333, 357 n.8 (1970) (Harlan, J., concurring); Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961).

149. 367 U.S. 488 (1961).

150. Earlier, in Everson v. Board of Educ., 330 U.S. 1 (1947), the Court had stated: "Neither [a state nor the federal government] can force nor influence a person to go or to remain away from church against his will or force him to profess a belief *or disbelief* in any religion. No person can be punished for entertaining or professing religious beliefs *or disbeliefs.*" *Id.* at 15-16 (emphasis added). Although this passage indicates that the Court recognized early in free exercise clause case history that disbelief in religion would be constitutionally protected, it did not directly consider the question until *Torcaso. See* 367 U.S. at 495.

site to receiving his or her commission.[151] Holding that this requirement violated a person's right of nonbelief, the Court stated that this right was protected under the free exercise clause.[152]

In the conscientious objector cases following *Torcaso,* the Court expanded the meaning of religion as it was used in section 6(j) of the Military Selective Service Act of 1967[153] to include beliefs that were clearly secular in nature.[154] Although the Court's interpretation of religion was in a statutory context, the cases illustrate the difficulty of distinguishing religious from secular conscience. In *Welsh v. United States,*[155] the applicant for conscientious exemption status clearly noted that in his view the beliefs that entitled him to come within the religious exemption were not religious.[156] Despite Welsh's protestations, the Court held that his beliefs were religious even though they were neither theistic nor atheistic in nature.[157]

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151. 367 U.S. at 496.

152. *Id.* Torcaso had also contended that article VI of the Constitution, which provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States," applied to the states. *Id.* at 489 n.1. The Court found it unnecessary to decide this question, as the religious oath requirement was invalidated on free exercise grounds. *Id.*

153. 50 U.S.C. app. § 456(j) (1976 & Supp. IV 1980).

154. *See generally* Meiklejohn, *Conscientious Objection in the Supreme Court: Welsh and Gillette,* 8 CUM. L. REV. 1 (1977); Norman, *The Selective Conscience,* 11 DUQ. L. REV. 338 (1973); Paris, *Toward an Understanding of the Supreme Court's Approach to Religion in Conscientious Objector Cases,* 7 SUFFOLK U. L. REV. 449 (1973); Silva, *The Constitution, the Conscientious Objector, and the "Just" War,* 75 DICK. L. REV. 1 (1970); Comment, *supra* note 60.

155. 398 U.S. 333 (1970).

156. *Id.* at 353 n.7 (Harlan, J., concurring). Welsh denied that his objection to the war was religiously based. Instead, he asserted that his beliefs derived from "sociological, economic, historical, and philosophical considerations." Welsh v. United States, 404 F.2d 1078, 1081-82 (1968). A letter Welsh wrote to his local draft board exemplifies the foundations for his stand against the war:

> I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to "defend" our "way of life" profoundly change that way of life. I see that in our failure to recognize the political, social, and economic realities of the world, we, *as a nation*, fail our responsibility *as a nation*.

398 U.S. at 342 (emphasis in original).

Apparently anticipating that there might be some difficulty in defining his beliefs as religious, Welsh argued in the alternative that the exemption accorded religious believers violated the establishment clause. The majority of the Court did not consider this argument. *See* 398 U.S. at 368 (White, J., dissenting). The majority's inclusion of Welsh's beliefs under its definition of religion led Justice Harlan to describe the definition as "Newspeak." *Id.* at 353 n.7 (Harlan, J., concurring).

157. Welsh's "religion" was based on his moral and ethical precepts. 398

Most recently, the Court decided in *Thomas v. Review Board*[158] that a Jehovah's Witness's claim that he could not work in an armaments factory was protected by the free exercise clause.[159] The Court reached this conclusion even though the claimant himself could not articulate the nature of his religious objections and the Indiana Supreme Court found that his objection was personal and philosophical rather than religiously based.[160] In fact, some of the testimony in the case indicated that the plaintiff's religion did not require his absence from the armaments factory.[161]

3. *Summary*

These cases illustrate the Supreme Court's confusion when deciding issues of religious free exercise and rights of conscience. It is not clear, for example, why the right not to believe in religious values is construed as a religious right[162] while the right not to engage in a flag salute because of religious conscience is construed as a right of expression.[163] In any event, two major points may be gathered from these cases. First, whether an activity is protected as free expression, free exercise, or both is not critical to the Court's analysis. Second, the cases establish that no element of religious activity, includ-

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U.S. at 341-43. The *Welsh* majority's definition of religion has been analyzed by some commentators. *See, e.g.,* Paris, *supra* note 154.

158. 450 U.S. 707 (1981).

159. *Id.* at 719.

160. *See* Thomas v. Review Bd., — Ind. —, 391 N.E.2d 1127, 1133 (1979). The Indiana Supreme Court had given weight to Thomas's testimony that although he objected to working directly in the production of tanks, he admittedly did not object to working on raw products necessary for the production of tanks. *See* 391 N.E.2d at 1131 (quoted in 450 U.S. at 715). In fact, Thomas earlier had worked on the raw product in the same armaments factory. 450 U.S. at 710. To this the Supreme Court responded:

> The [Indiana] court found this position inconsistent with Thomas' stated opposition to participation in the production of armaments. But, Thomas' statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.

450 U.S. at 715.

161. The Indiana Supreme Court had found it significant that another Jehovah's Witness deemed it religiously acceptable to work in the factory. 391 N.E.2d at 1128-29, 1133. The United States Supreme Court disagreed with the legal significance of that finding. *See supra* note 65.

162. *See supra* notes 149-52 and accompanying text.

163. *See Barnette,* 319 U.S. at 634-35, 642.

ing religious conscience, is exclusively the domain of the free exercise clause.[164] Elements of religious belief, conscience, and moral conviction are evident in *Wooley,*[165] *Widmar,*[166] *Barnette,*[167] *Torcaso,*[168] and *Thomas,*[169] even though in the first three cases the Court protected these elements as expression while in the last two it protected the same elements as religious exercise. Thus, as in the religious activity cases, the question remains whether a separate free exercise inquiry is necessary or appropriate.

IV. DEFINING THE SCOPE OF FREE EXERCISE RIGHTS

The previous section demonstrated the great extent to which the Supreme Court is using freedom of expression analysis in cases involving religious liberty. Prayer, worship, and religious conscience have all been protected as expression. Merely establishing that the freedoms of speech and religion overlap, however, does not end the inquiry. Two further questions remain. First, should the religious element in an expression case entitle the litigant to additional protection unavailable to those presenting nonreligious expression claims? This question is essentially one of degree, requiring an assessment of whether the Constitution should provide greater protection for religious matters than for nonreligious matters. Second, should there be greater latitude in recognizing a protected interest when religious claims are presented than when nonreligious claims are advanced? This question is one of definition, but is closely related to the first. In effect, it involves a decision whether the Constitution should define claims entitled to protection under the free exercise clause more broadly than those protectable under the free expression clause.

A. Rejecting the Argument for a More Stringent Protection for Religious Exercise

In cases in which religious and expression interests overlap, it has been suggested that issues of religious freedom, whether they be characterized as free exercise or as religious expression, require more stringent and more diligent protec-

164. *But see* Merel, *supra* note 59, at 811 (free speech clause protects conscientious speech while free exercise clause protects religious conscience).
165. 430 U.S. 705 (1977).
166. 454 U.S. 263 (1981).
167. 319 U.S. 624 (1943).
168. 367 U.S. 488 (1961).
169. 450 U.S. 707 (1981).

tion. Explicit in this argument is the premise that there is an ordering of first amendment freedoms, and religious freedom is supreme.[170]

The argument for free exercise supremacy was first presented in the Jehovah's Witnesses cases of the 1930's and 1940's. In those cases, particular governmental actions were attacked as violating both free exercise and free speech.[171] In no case, however, did the Court vindicate a free exercise right while simultaneously denying a free speech claim.[172]

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170. *See* Martin v. Struthers, 319 U.S. 141, 143 (1943) (Murphy, J., concurring) (freedom to practice one's religion enjoys the most preferred position). *Cf.* United States v. Ballard, 322 U.S. 78, 92-95 (1944) (Jackson, J., dissenting) (false representations of religious experience or belief should not be grounds for criminal fraud conviction); Jones v. Opelika, 316 U.S. 584, 621 (1942) (Murphy, J., dissenting) (free exercise is supreme), *rev'd,* 319 U.S. 103 (1943). *See also* Pfeffer, *supra* note 47 (free exercise is the most favored first amendment right).

There is nothing in the Constitution itself, however, that suggests the primacy of the free exercise clause, nor is there anything that can easily be garnered from the intent of the framers. As has been candidly admitted, the history behind the religion clauses is hopelessly ambiguous in determining the framers' intent. Abington School Dist. v. Schempp, 374 U.S. 203, 237 (1963) (Brennan, J., concurring). Justice Brennan stated: "A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected for . . . the historical record is at best ambiguous and statements can readily be found to support either side of the proposition." *Id. See also* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 652-53 (1981) (religious peripatetic conduct accorded no higher protection than other, nonreligious proselytizing); Prince v. Massachusetts, 321 U.S. 158, 164 (1944) (all the first amendment freedoms have a preferred position and no single freedom is supreme). *But see* Pfeffer, *supra* note 47 (*Wisconsin v. Yoder* established the primacy of the free exercise clause).

171. *See, e.g.,* Saia v. New York, 334 U.S. 558 (1948) (loudspeaker permit requirement invalidated on free speech grounds where Jehovah's Witness used loudspeaker for preaching); West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (Jehovah's Witnesses claimed denial of right to refuse to salute the flag violated both free exercise and free speech clauses); Cox v. New Hampshire, 312 U.S. 569 (1941) (Jehovah's Witnesses' parading activities subject to free speech analysis).

Most recently, both free speech and free exercise violations were alleged in Widmar v. Vincent, 454 U.S. 263 (1981) (university regulation prohibiting use of school facilities by student religious group held violative of free speech clause) and in Wooley v. Maynard, 430 U.S. 705 (1977) (Jehovah's Witness claimed New Hampshire regulation requiring display of state motto on all automobile license plates violated free speech and free exercise liberties).

172. Free exercise claims, in fact, were given summary treatment in early cases linking free exercise and free speech, free press and free assembly claims. *See, e.g.,* Martin v. Struthers, 319 U.S. 141, 142 (1943) (religious motivation of speaker given only brief mention by Court); Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) (free exercise claim involving cursing of public officer summarily dismissed). *See also* Pfeffer, *supra* note 47, at 1124-30 (chronicling Court's treatment of early free exercise claims and concluding that free

Prince v. Massachusetts[173] dramatically illustrates this point. In *Prince,* the Court was faced with a petitioner who acknowledged that she was entitled to no protection under the free speech clause yet sought relief under the free exercise clause.[174] The Court rejected the claim of free exercise primacy in no uncertain terms, and indeed discussed the rights of free speech and free exercise as embodying a unitary conception. The Court stated:

> If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and functionings. Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life.[175]

The Court recently reaffirmed this position in *Heffron v. International Society for Krishna Consciousness, Inc.*[176] In that case, the Court was faced with a challenge by a religious organization against a Minnesota State Fair rule that required literature distributions and solicitations to occur only at designated booth spaces.[177] The plaintiffs, the International Society for

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exercise claims were upheld only where bracketed with free speech or free press claims).

Moreover, recent cases also suggest that a free exercise claim would not succeed where a free speech claim failed. The Court has rejected free speech challenges to compulsory union dues where the union's political views contravened the contributor's views. International Ass'n of Machinists v. Street, 367 U.S. 740, 749-50 (1961); Railway Employes' Dep't v. Hanson, 351 U.S. 225, 238 (1956). Cases rejecting free exercise challenges to similar statutes are consistently denied review by the Court. *See, e.g.,* Hammond v. United Papermakers Union, 462 F.2d 174 (6th Cir.), *cert. denied,* 409 U.S. 1028 (1972); Linscott v. Millers Falls Co., 440 F.2d 14 (1st Cir. 1971), *cert. denied,* 404 U.S. 872 (1972); Gray v. Gulf M. & O.R.R., 429 F.2d 1064 (5th Cir. 1970), *cert. denied,* 400 U.S. 1001 (1971). *Hammond, Linscott* and *Gray* all involved claims by Seventh-Day Adventists that being forced to join or contribute to labor unions violated their freedom of religion. The claims were rejected. *But see infra* note 207 (suggesting that, to the extent rights of expression were implicated in *Yoder* and *Thomas* and were overlooked, the Court has indicated a preference for free exercise rights over free speech rights).

173. 321 U.S. 158 (1944).

174. *Id.* at 164. The case involved a Jehovah's Witness who had been convicted under a state child labor law when she allowed her niece to distribute religious literature on the street. *Id.* at 159-60.

175. *Id.* at 164-65.

176. 452 U.S. 640 (1981).

177. The religious group sought an exemption from a rule requiring all ex-

Krishna Consciousness (ISKCON), challenged this rule as violating both their free speech and religious exercise rights.[178] It was stipulated that peripatetic solicitation was part of ISKCON's religious ritual and required by their religious tenets.[179] On this basis, the Minnesota Supreme Court held that the ISKCON members could not be confined to a booth space and were constitutionally entitled under free exercise to engage in peripatetic conduct.[180] On appeal before the United States Supreme Court, however, ISKCON decided not to rest its claim on the ruling of the Minnesota court, and instead sought relief based solely on its asserted free speech rights.[181] Nonetheless, the Court discussed ISKCON's free exercise claim in its opinion:

> [ISKCON] and its ritual . . . have no special claim to First Amendment protection as compared to that of other religions who also distribute literature and solicit funds. None of our cases suggest that the inclusion of peripatetic solicitation as part of a church ritual entitles church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process. Nor for present purposes do religious organizations enjoy rights to communicate, distribute, and solicit on the fair grounds superior to those of other organizations having social, political, or other ideological messages to proselytize. These nonreligious organizations seeking support for their activities are entitled to rights equal to those of religious groups to enter a public forum and spread their views, whether by soliciting funds or by distributing literature.[182]

Thus, in *Heffron,* as in *Prince,* the Court refused to provide independent vitality to the free exercise claim when rights of expression were also involved.

In addition to the case law, sound policy arguments dictate against according free exercise rights greater protection than free speech rights. The free exercise clause generally performs two separate functions. It protects individual liberty,[183] and it

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hibitors attending the Minnesota State Fair to conduct sales or distributions of written materials from a booth. *Id.* at 643-44.

178. *Id.* at 644-46.

179. International Soc'y for Krishna Consciousness, Inc. v. Heffron, 299 N.W.2d 79, 81 (Minn. 1980).

180. *Id.* at 85.

181. 452 U.S. at 647.

182. *Id.* at 652-53.

183. *See* Merel, *supra* note 59, at 810 (unifying principle underlying the religion clauses is that individual choices in matters of religion should remain free). Various commentators have tried to express the rights or values implicit in the free exercise clause. *See, e.g.,* Clark, *supra* note 68, at 336-37, 342 (in addition to the justifications for religious freedom that are duplicated by those for freedom of speech, the free exercise clause promotes a healthy idealism and, most important, protects people from the severe psychic turmoil that can be

promotes a society that is enriched by cultural pluralism.[184] Both of these goals are also served by the free speech clause.[185] The free speech clause, however, performs an additional function, well described by Professor Miekeljohn as the promotion of the political process and the exchange of ideas necessary for self-government.[186] Religious exercise, in contrast, accomplishes no such purpose. In fact, the establishment clause may be seen as an attempt by the framers to insure that the democratic process not be unduly influenced by religious values.[187] This purpose was explicitly noted by the Court in *Lemon v. Kurtzman*.[188] The language in *Lemon* is enlightening:

> Ordinarily political debate and division, however vigorous or even par-

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brought about by compelled violations of conscience); Laycock, *supra* note 14, at 1388-89 (the free exercise clause protects the freedom to carry on religious activities, the right to carry on these activities autonomously through communal organizations, and the right to conscientiously object to government policy); Weiss, *supra* note 21, at 623 (religion is protected only in the realm of belief or pure manifestations affecting belief); Note, *supra* note 59, at 1056, 1058 (core of the free exercise clause is the inviolability of conscience).

184. *See* Clark, *supra* note 68, at 337 (protection of religious or conscientious values promotes valuable idealism); Note, *supra* note 59, at 1056, 1058 (free exercise clause promotes a desirable pluralism of thought). For a discussion of the value of cultural pluralism underlying the free exercise clause, see Pfeffer, *supra* note 47, at 1118-20.

185. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974); Cohen v. California, 403 U.S. 15, 24 (1971); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). *See also* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-9 (1970) (values underlying system of freedom of expression are individual self-fulfillment, advancement of knowledge and discovery of truth, participation in decisionmaking by all members of society and achievement of more adaptable and more stable community); Stone, *supra* note 81, at 104 (free speech serves the values of enhancing individual autonomy and personal growth and of facilitating intelligent self-government).

186. *See* A. MEIKLEJOHN, POLITICAL FREEDOM 96 (1960); Meiklejohn, *The First Amendment Is an Absolute,* 1961 SUP. CT. REV. 245. *See also* Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1, 25 (1971); Kalven, *The New York Times Case: A Note on the "Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 208; Stone, *supra* note 81, at 101 n.101.

187. Walz v. Tax Commission, 397 U.S. 664, 695 (1970) (Harlan, J.); Board of Educ. v. Allen, 392 U.S. 236, 249 (1968) (Harlan, J., concurring); Abington School Dist. v. Schempp, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring). *See also* Freund, *Comment, Public Aid to Parochial Schools,* 82 HARV. L. REV. 1680, 1692 (1969). *But see* Gaffney, *Political Divisiveness Along Religious Lines: Entanglement of the Court in Sloppy History and Bad Public Policy,* 24 ST. LOUIS U. L. J. 205, 224-34 (1980). Construing constitutional law based on a view of political divisiveness along religious lines, Professor Gaffney asserts, is inimical to our concept of civil liberties. Gaffney also states that discouraging political participation, whether religiously motivated or otherwise, contravenes the right of public discussion. *Id.* at 233-34. He concludes that in law the divisiveness test has been "useless," as a statement of American values it is misguided, and therefore that it should be shorn from constitutional thought before it causes serious harm. *Id.* at 236.

188. 403 U.S. 602 (1971).

> tisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect . . . . The potential divisiveness of such conflict is a threat to the normal political process . . . . It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government . . . . The history of many countries attests to the hazards of religion's intruding into the political arena or political power intruding into the legitimate and free exercise of religious beliefs.[189]

One does not have to argue that religious involvement in the political process is itself violative of the establishment clause.[190] But in light of the establishment clause's express limitation on religious influence in government, and because the Court has recognized no comparable limitation on expression,[191] it is difficult, if not untenable, to argue that religious exercise is the favored freedom.

A possible response might be that religious exercise can be segregated from its political effects, and when so segregated must be entitled to special protection. But such segregation is simply impossible. Concepts such as equality, human rights, and the quest for peace have political and religious overtones. For example, the abortion issue, to some a profoundly religious issue, is laden with political, social, and even economic overtones. The religious objection to working in an armaments factory expressed in *Thomas* has profound political ramifications. The current efforts of the Christian Right must be characterized as political as well as religious, and this political involvement is not unique.[192] Religious organizations took a major role in opposition to the Vietnam War. Favoritism toward religious exercise may therefore either directly or indirectly result in official promotion of the ideas embodied within the religious exercise.

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189. *Id.* at 622-23.

190. The argument is not that religious organizations should be excluded from the political arena, but rather, that religious organizations should not be accorded any special preference when exercising their rights of political expression. *See generally* Gaffney, *supra* note 187; Laycock, *supra* note 14, at 1393.

191. *See, e.g.,* Buckley v. Valeo, 424 U.S. 1, 93 n.127 (1975).

192. *See, e.g.,* Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972), *cert. denied,* 414 U.S. 864 (1973). In *Christian Echoes,* a religious organization claimed that its free exercise rights were violated when it was denied a tax exemption for engaging in political activity. Although the religious group argued that its religion mandated involvement in politics, the court found no free exercise or free speech violation. *Id.* at 857.

The problem of favoritism for religious exercise is demonstrated by two examples which currently are the source of litigation: religious claims of exemption from charitable solicitation laws[193] and religious claims for mandatory tax exemption.[194] Charitable solicitations are, of course, requested for a variety of causes, including those of a political nature.

193. *See, e.g.,* Espinosa v. Rusk, 634 F.2d 477 (10th Cir. 1980), *petition for cert. filed,* 50 U.S.L.W. 3079 (U.S. Jan. 19, 1981) (No. 80-1207). In *Espinosa* the court held that a city ordinance which regulated charitable solicitations and exempted solicitations by religious groups where the solicitations were for "evangelical, missionary or religious but not secular purposes" violated the first amendment, because the ordinance forced public officials to define religious activities. 634 F.2d at 482.

194. Under the approach posited in this Article, a tax exemption denied to a secular organization should not be granted to a religious organization simply because of the organization's religious nature. The Supreme Court has not yet resolved this issue. The problem may be illustrated by comparing Bob Jones Univ. v. United States, 639 F.2d 147 (4th Cir. 1980), *cert. granted,* 50 U.S.L.W. 3278 (U.S. Oct. 13, 1981) (No. 81-3), and its companion case, Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977), *aff'd* (unreported), *cert. granted,* 50 U.S.L.W. 3278 (U.S. Oct. 5, 1981), with Runyon v. McCrary, 427 U.S. 160 (1976), Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977) (en banc) (plurality opinion), *cert. denied,* 434 U.S. 1063 (1978), and Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980).

In *Bob Jones University,* the university sued for back taxes paid when the Internal Revenue Service revoked the university's tax exempt status on grounds that the university's rules prohibiting interracial dating and marriage violated public policy. 639 F.2d at 149. The university had argued that its policies were based on religious beliefs in nonmiscegenation and that denial of its tax exempt status was a violation of the free exercise and establishment clauses. The court held that revocation of the university's tax exempt status did not contravene the first amendment, reasoning that any free exercise infringement was indirect and was justified by the government's compelling interest in preventing racial discrimination. *Id.* at 154. Similarly, in *Goldsboro,* the school sought recovery of taxes when its tax exempt status was revoked based on a school policy of maintaining racial discrimination. 436 F. Supp. at 1315-16. The court held there was no violation of either free exercise or establishment, reasoning that tax exemptions are granted as a matter of public policy and therefore may be denied if the religious organization violates federal public policy against racial discrimination. *Id.* at 1320.

The issue in *Runyon* was whether a private, nonsectarian school was prohibited under 42 U.S.C. § 1981 from practicing racial discrimination in admissions. 427 U.S. at 163. The court said yes, and the issue after *Runyon* was whether a religious school would be exempt from liability under § 1981 and allowed to discriminate racially on free exercise grounds. That issue was addressed in *Brown,* and in a plurality opinion the court held that racial segregation practices by a sectarian school are not protected by the first amendment. 556 F.2d at 313-14. Although the majority agreed on the result, they did not agree on the issue of whether the school's practice of segregation constituted a religious belief. The majority found the discriminatory policy to be social or political rather than religious; thus, the discrimination practiced by the school did not represent exercise of religion and was not protected by the first amendment. *Id.* at 311. In *Fiedler,* however, the court suggested that a religious school might properly discriminate on the basis of race, on free exercise grounds, 631 F.2d at 1150-51, but held that there was no evidence to support

Many states require secular organizations to file statements indicating how they raised money and where the money was spent. Current challenges brought under the free exercise clause argue that such requirements may not be constitutionally maintained against a religious organization.[195] However, the failure of religious organizations to comply with regulations applicable to other organizations that are in effect competing with the religious organizations for the same funds provides an unfair advantage to the religious advocates. Because spending money is speech,[196] and because the power to obtain and spend money has dramatic implications for the political process, exemptions from charitable solicitation laws may give religious organizations a more powerful presence in the political arena than their secular counterparts.

The argument that religious organizations are entitled to tax exemptions leads to similar results.[197] The syllogism is analogous: freedom from taxation is money, money is speech, and the freedom to be excused from taxation provides a greater power of speech to the exempted party. One dollar donated to

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the school's claim that its discrimination was based on religious belief, *id.* at 1153-54.

Brown therefore suggests that political beliefs are not sufficient grounds to allow racial discrimination in violation of § 1981, while *Fiedler* suggests that religious beliefs would be sufficient grounds to allow the same racial discrimination. Further, *Runyon* suggests that a nonsectarian school may not practice racial discrimination, while the issue remains open in *Bob Jones University* and *Goldsboro* as to whether a religious school may practice the same racial discrimination on free exercise or establishment grounds.

See generally Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations,* 79 COLUM. L. REV. 1514 (1979) (denial of tax exempt status to religious schools which racially discriminate presents establishment clause and free exercise clause tensions); Simon, *The Tax-Exempt Status of Racially Discriminatory Religious Schools,* 36 TAX L. REV. 477 (1981); Comment, *The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools,* 93 HARV. L. REV. 378 (1979) (assessing current state of Internal Revenue Service attempts to deny tax exempt status to racially discriminatory private schools and need for judicial intervention).

195. *See supra* note 193.

196. Buckley v. Valeo, 424 U.S. 1, 16 (1976). *See also* Polsby, *Buckley v. Valeo: The Special Nature of Political Speech,* 1976 SUP. CT. REV. 1; Wright, *Politics and the Constitution: Is Money Speech,* 85 YALE L.J. 1001 (1976).

197. *See, e.g.,* United States v. Lee, 102 S. Ct. 1051 (1982). In *Lee,* the Court refused to carve out an exemption from the national social security system for the Amish, a religious sect opposed to payment or receipt of social security benefits. In his concurrence, Justice Stevens noted the problems inherent in legislative exemptions to comprehensive national tax systems include defining the exempt category so as to keep the category narrow and readily identifiable. *Id.* at 1057-58 (Stevens, J., concurring).

a tax exempt organization is worth more than one dollar donated to an organization without tax exempt status.

To argue that the Constitution requires favoritism toward religious practices, therefore, has profound political implications. Acceptance of the argument would mean that, as a constitutional matter, religious ideas are to be accorded a special status in the marketplace of ideas. Besides implicating establishment clause problems, such a result cuts at the very heart of the freedom of expression. As stated by Professor Karst, the first amendment guarantees "equal liberty of expression."[198] No class of ideas shall maintain a preferred right to be expressed. This guarantee assumes the equal dignity of each individual through self-expression and is fundamental to affording equal dignity to each idea as it competes for recognition.[199] Granting religious ideas and religiously motivated speakers a particular exemption not available to other types of ideas denies equal liberty of expression.

There are difficult problems even with legislative accommodation of religious organizations.[200] Legislative accommodation, however, is a wholly different question than the question of judicially created exemptions. A judicially created exemp-

198. Karst, *Equality as a Central Principle in the First Amendment,* 43 U. CHI. L. REV. 20 (1975). Professor Karst sees Police Department of Chicago v. Mosley, 408 U.S. 92 (1972), as the Court's first full pronouncement of the principle of "equal liberty of expression." Karst, *supra,* at 26. In *Mosley,* the Court held that an ordinance prohibiting all picketing near schools except for labor picketing denied equal protection of the laws when challenged by a political picketer. 408 U.S. at 95-96. Because the *Mosley* decision rested on fourteenth amendment equal protection grounds, yet concerned an issue traditionally analyzed exclusively under the first amendment, the decision "squarely addressed the relationship between the equality principle and the first amendment." Karst, *supra,* at 27.

199. *See* Karst, *supra* note 198, at 23-26. Karst identifies three fundamental purposes underlying the first amendment principle of equal liberty of expression: (1) to permit informed choices by citizens in a self-governing democracy; (2) to aid in the search for truth; and (3) to permit each person to develop and exercise his or her capacities, thus promoting the sense of individual self-worth. *Id.* at 23.

200. *See, e.g.,* United States v. Lee, 102 S. Ct. 1051, 1058 n.2 (1982) (Stevens, J., concurring). Justice Stevens advocated employing a strong presumption against even legislative exemptions in order to keep legislatures "out of the business of evaluating the relative merits of differing religious claims." *Id.* According to *Carey v. Brown* and *Mosley,* however, if activities undertaken in the name of free exercise are speech, then any legislative exemptions that would be tantamount to a content based regulation would have to be supported by a compelling state interest. Accomodation of religious values may be seen as a compelling state interest. Simply because a state's legislative interest in accommodating religion is compelling, does not mean that accommodation is constitutionally required. Indeed, this seems to be one of the major errors of the Court in deciding cases under the religion clauses.

tion means that a prejudice in favor of the religious organization is required by the Constitution. On the other hand, a congressional decision to favor religious groups along with other organizations, so long as the decision does not violate the establishment clause,[201] does not suggest that the choice was mandated by the free exercise clause. A congressional decision to favor religion that does not violate the establishment clause simply means that all religious favoritism is not prohibited by the Constitution.[202] The establishment clause and the free speech clause at the least demonstrate that a prejudice in favor of religion is not required by the Constitution.

B. Rejecting the Argument for a Specialized Treatment for Religious Conscience

Although the Court has rejected the claim that religious practices require more stringent protection than nonreligious activities, the Court's decisions in *Thomas, Yoder,* and *Sherbert* establish that, in deciding the scope of constitutionally permissible exclusions from laws of general applicability, the Court will define the religious exercise exclusion more broadly than the free expression exclusion, based on a specialized treatment for religious conscience.[203] One cannot overemphasize, however, that these are the only three cases that have accorded religious exercise greater protection. Moreover, because religious conscience has never been protected in all circumstances,[204] the question is essentailly where to draw the line in defining the scope of protected religious conscience.

This Article advocates drawing the line at the protection extended to conscience, including religious conscience, in the expression cases. Before reaching the considerations that support this position, it is worth noting that this approach would not be a major incursion on the existing case law that accords special protection to rights of religious conscience. Even in these kinds of cases, elements of expression may be at stake. In *Wisconsin v. Yoder,*[205] for example, the question was

201. *See, e.g.,* Walz v. Tax Comm'n, 397 U.S. 664, 667 n.1 (1970) (state's grant of property tax exemptions to religious organizations upheld where exemption applied to religious, charitable, and benevolent groups).

202. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970).

203. *See* Note, *supra* note 59, at 1077 (*Sherbert* "crystallized the doctrine that there is a 'zone of required accommodation' in which the state must use religious classifications to prevent direct or indirect burdens on religion" unless contrary compelling state interest exists).

204. *See supra* note 110.

205. 406 U.S. 205 (1972).

whether the state could constitutionally convict the Amish for failing to comply with a compulsory education requirement, which the Amish argued violated their free exercise rights. The claim cited in *Yoder,* freedom from compulsory education, is so akin to what has traditionally been considered a free expression claim that it is questionable whether the case was properly decided on free exercise grounds. First, the Amish sought to have their children free from the influence of secular education, which implicated their associational rights in being forced to attend a public school.[206] Second, as noted by Professor Pfeffer, the issue in *Yoder* might well be described as the freedom to learn, or perhaps not to learn, a right traditionally in the province of the speech clause.[207]

206. *See* Runyon v. McCrary, 427 U.S. 160, 175-76 (1976) (freedom of association does not protect the practice of excluding blacks from private schools); L. TRIBE, *supra* note 65, § 14-1, at 812 ("[a]ny attempt to constitutionalize the relationship of the state to religion must address the fact that much of religious life is inherently associational").

207. *See* Pfeffer, *supra* note 47, at 1120 (because freedom to learn is protected by the first amendment, it follows that the freedom not to learn is also a protected first amendment right). *Cf.* Epperson v. Arkansas, 393 U.S. 97, 105-06 (1968) (first amendment forbids statutes prohibiting teaching of evolution).

Finding elements of expression in the other two religious conscience cases—Thomas v. Review Bd., 450 U.S. 707 (1981) and Sherbert v. Verner, 374 U.S. 398 (1963)—is attenuated, but by no means without support in the cases. *Thomas* involved the issue whether a state could constitutionally deny unemployment compensation to an individual who claimed his religious beliefs precluded him from working in an armaments factory. The Court held that the individual's right to the unemployment benefit was protected by the free exercise clause. *Id.* at 716. The case gives rise to questions of coerced association with a business producing armaments. More important, the *Thomas* claimant's free exercise right was based on his religious opposition to war, *id.* at 716, and his refusal to work may be seen to communicate this view by symbolic conduct. For example, in Spence v. Washington, 418 U.S. 405 (1974), the Court found that a person who put a peace sign on a flag in order to express his opposition to war was engaged in a speech activity. *Id.* at 406. A person's refusal to work in an armaments factory is no less a statement against war than was the defendant's claim in *Spence*.

In *Sherbert,* the issue was whether an unemployment compensation applicant could be denied benefits for failing to work on Saturdays on account of religious belief. The Court decided that the denial of benefits was unconstitutional under the free exercise clause. 374 U.S. at 410. One commentator, writing before the *Wooley* decision, argued that *Sherbert* could not be explained as resting on free expression grounds since the symbolic qualities of Mrs. Sherbert's acts were minimal and her motivation was not primarily one of communication. *See* Clark, *supra* note 68, at 336.

The validity of these distinctions becomes questionable in light of *Wooley*. In *Wooley,* the Court recognized that Maynard did not have an intention to communicate and the symbolic nature of his obstruction of the state motto on his license plate was minimal. 430 U.S. at 713 n.10. Nonetheless, the Court found Maynard's right of expression at issue, holding that his freedom of mind was violated by the state's imposition of its motto on his license plate. *Id.* at 714. *See supra* notes 126-31 and accompanying text. Similarly, in Abood v. De-

The purpose of the foregoing is not to argue that *Yoder* would have been decided the same way if litigated as a free expression case. The Court was adamant that the result would not have been the same absent the religious aspect of the litigants' claims.[208] Rather, *Yoder* demonstrates that because elements of expression may exist in a case in which the Court has vindicated a free exercise interest, limiting free exercise protection to expression contours, as this Article proposes, may not be a significant encroachment on the latitude of conscientious claims recognized as implicating first amendment concerns.

More important, allowing the religious exemption in *Yoder* illustrates the danger in continuing an independent free exercise approach. If protected rights of expression were present in the case, the Court erred in not expanding its relief to include nonreligious claimants. To hold otherwise would be to express a favoritism toward religious exercise that, as has been shown, is constitutionally inappropriate.[209] The fear that a broader definition for protectable free exercise claims may effectively favor religious liberties over nonreligious liberties is not without foundation. At least one commentator has argued that *Yoder* accomplished precisely this result.[210]

In addition to potentially leading the Court into favoring religion over speech, the Court's current approach favors religious values over nonreligious values even when expression interests are not clearly implicated. Implicit in the approach to

troit Bd. of Educ., 431 U.S. 209 (1977), the Court construed first amendment rights within the working place and held that it was unconstitutional to force a public employee to violate his or her rights of conscience by paying union dues used for political purposes. *Id.* at 234. *Abood* and *Wooley* cannot be distinguished from *Sherbert* on conscience grounds, because forcing Mrs. Sherbert to work on a day prohibited by her religion was exactly the same sort of affront to her freedom of mind or her freedom to maintain the integrity of her beliefs as was present in *Wooley* and *Abood*.

Any possible distinction must therefore rest on the argument that *Wooley* and *Abood* involved coerced expression of another's beliefs, even though in *Wooley* the objector could have dissociated himself from the message expressed, and did not simply rest on conscience grounds alone. It is arguable, however, that no less coerced expression occurs when one is forced to work than when one is forced to pay union dues or to exhibit a state motto on a license plate. One's work may be as much a statement of one's ideas as one's union or license plate. Thus, although *Sherbert* may be less conducive to an expression analysis than *Thomas* or *Yoder,* the construction of *Sherbert* as an expression case is not as marked an extension of the existing jurisprudence as one might initially suppose.

208. *See* 406 U.S. at 215.

209. *See supra* notes 170-202 and accompanying text.

210. *See* Pfeffer, *supra* note 47, at 1140.

religious exercise proposed in this Article, however, is the premise that no principled basis exists for allowing individuals to be exempted from laws of general applicability solely on the basis of religious conscience. There are many circumstances in which a nonreligious claimant may have a legitimate objection to the regulation to which religious claimants have sought exemption on religious grounds. For example, one might object to employment in an armaments factory on moral or philosophical grounds as well as on religious grounds. Nonetheless, under the Court's current approach, only religious claimants would be entitled to unemployment compensation benefits after refusing to work in the armaments factory.[211] Because the premise of protecting religious conscience is the prevention of psychic harm[212] brought about by compelled violation of conscience, there is no reason not to extend the exemption to nonreligious claimants as well. The critical element in preventing psychic harm is assessing the strength of the conscientiously held belief. Although traditional religious beliefs may be motivated by a strong conscience, the same may be said of most moral beliefs.[213] Indeed, many moral or philosohical beliefs are held with deeper conviction than are many religious beliefs. Often the same individuals may have moral principles, violations of which would generate far more significant psychic harm than would a violation of their religious beliefs. One need only think of people whose religious beliefs technically forbid them from working on the sabbath, but whose moral or philosophical position forbids them from killing in a war. The Court's current approach anomalously suggests that while such persons could refuse Saturday work, they would be required to go to war. Such an approach serves no intelligible policy.[214]

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211. *See* Thomas v. Review Bd., 450 U.S. 707, 713 (1981).

212. *See* Clark, *supra* note 68, at 337, 342 (free exercise clause protects individual from the exceptional harm that results from compelling activity contrary to one's conscience); Note, *supra* note 59, at 1056 (inviolability of conscience is thought to be a precondition of emotional well-being).

213. *See* M. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE 99 (1968) ("[P]ersons who avow religions beliefs . . . do not hold a monopoly on conscience.").

Ronald Dworkin explains that although there may be utilitarian arguments in favor of limiting exceptions to laws of general applicability to religious grounds, those reasons should not count as grounds for limiting a right: "A government that is secular on principle cannot prefer a religious to a nonreligious morality as such." R. DWORKIN, TAKING RIGHTS SERIOUSLY 201 (1977). *See also* Giannella, *supra* note 106, at 1431 (nontheistic conscientious objections based on deep personal beliefs should receive equal treatment to theistically based scruples).

214. One possible method to resolve this difficulty would be to adopt a

This Article takes the position that, by limiting the freedom to manifest dissent to the parameters of the free speech clause, no significant encroachment on fundamental interests results. Generally, religious conscience is affirmed through expressive activities manifesting closely held religious beliefs, or is most substantially infringed when it is violated by laws requiring a contrary manifestation. Both of these aspects of religious conscience, however, are protected by free speech principles. Prayer, worship and ritual are all protected within freedom of expression,[215] and *Wooley v. Maynard* and its progeny[216] accord a broad protection to religious conscience by recognizing a freedom from coercive beliefs. Consequently, the only aspect of religious conscience not covered under the free expression mantle is conscience infringed by statutes of general applicability that are not directed at affecting any communicative beliefs. Extending favored protection to religious conscience under these circumstances violates principles of equal treatment.

The approach suggested in this Article reflects the Supreme Court's attitude during the 1930's and 1940's, when the interests of religious freedom and free speech were conjoined.[217] Currently, in cases other than those allegedly involving only religious conscience, free exercise claims have not been sustained unless combined with a free speech claim.[218] There is no reason to treat religious conscience differently.[219]

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broad reading of religion in the free exercise clause. For example, the Court could hold that it is constitutionally required to grant exemptions to a law of general applicability to all persons who object to the law because the law infringes an ultimate concern inextricably related to the identity of those persons. *See* Note, *supra* note 59, at 1072-75. Although the constitutional basis of this classification may be defensible because it rests on notions of equal treatment, such a broad interpretation presents other problems. *See, e.g., id.* at 1075-83. A major problem is that recognizing a great range of objections to laws of general applicability would require a basic rethinking of liberal democratic theory, which is premised on the concept of subordinating the individual conscience to the will of the majority. *See* Merel, *supra* note 59, at 812 (government premised on the subordination of individual conscience to majority rule); Note, *supra* note 11, at 362 & n.74 (basic premise of democratic theory is that laws take precedence over individual beliefs). *Cf.* J. LOCKE, OF CIVIL GOVERNMENT AND LETTERS ON TOLERATION 49 (1947); J. RAWLS, A THEORY OF JUSTICE 212, 368-71 (1971).

215. *See supra* notes 88-108 and accompanying text.

216. *See supra* notes 126-47 and accompanying text.

217. *See, e.g.,* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940).

218. *See supra* notes 88-108 and accompanying text.

219. This has been the approach adopted by the Court in cases involving both secular and religious conscience such as *Wooley*. *See supra* notes 126-31 and accompanying text. Freedom of conscience is not unique or central to free

C. Other Considerations Militating in Favor of Utilizing an Expression Analysis

In addition to concerns of favoritism, other problems associated with free exercise jurisprudence argue for treating free exercise claims no differently than free expression claims either in the definition of protected claims or in the extent of protection allowed. First, this approach may actually serve to protect religious liberty by eliminating the inquiry into the sincerity of one's beliefs and by minimizing the need to set forth judicially a constitutional definition of religion. Sincerity has been found to be such an elusive problem that Justice Jackson, writing in *United States v. Ballard,*[220] found the issue to be insoluble.[221] But a more central problem stems from the governmental inquiry itself. Any attempts to discern the sincerity of individual beliefs requires a cross-examination of values that might easily become an inquisition.[222] So long as exemptions are based exclusively on the free exercise clause, these dangers exist.[223]

The problem of discerning sincerity is solved, however, by linking the free exercise and free speech clauses. The free speech clause protects expressions of religious conscience and proscribes infringement on conscience from governmental attempts to coerce beliefs without engaging courts in subjective and intrusive inquiries. Thus, in *Wooley,* the Court did not have to inquire into the genuineness and import of the challenger's objections to find the law constitutionally infirm. The mere fact that the dissident found the views the government

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exercise. As one commentator has stated, "[p]ersonal conscience is one of the least distinctive elements in religious life . . . ." Note, *supra* note 11, at 357. Prayer, after all, is much more central as a manifestation of religious exercise than the more tangential right of conscience.

220. 322 U.S. 78 (1944).

221. *Id.* at 86.

222. Chief Justice Warren wrote that "a state-conducted inquiry into the sincerity of the individual's religious beliefs [is] a practice which a state might believe would itself run afoul of the spirit of constitutionally protected religious guarantees." Braunfeld v. Brown, 366 U.S. 599, 609 (1961).

223. [T]he dangers of undue governmental involvement in matters of personal faith cannot be wholly eliminated in the cases that remain unavoidably linked to the free exercise clause: however generous a test of sincerity and centrality [of religious beliefs] is adopted, however hard courts try not to impose any uniform orthodoxy, and however genuinely they attempt to limit evidence in such cases to intrinsic indications of fraud, they are already engaged in a treacherous business indeed when they try to assess the place that religion occupies in a person's life or the sincerity with which religious views are held.

L. Tribe, *supra* note 65, § 14-12, at 865.

sought to coerce abhorrent was sufficient to strike down the legislation.

Definitional problems are similarly minimized by using the approach posited in this Article. One of the inquiries normally before the Court in a free exercise challenge is whether the challenge is religiously motivated or based on a philosophical or moral objection masquerading as religious. This inquiry would become wholly unnecessary. The Court would not be forced to undertake the delicate task of defining religion in the free exercise context. That task may very well be unsuited to the judicial function and itself may violate first amendment concern.[224]

A final benefit in adopting expression analysis in religion cases is that it would effectively promote state neutrality in religious matters and would eliminate the so-called tension between the establishment and free exercise clauses.[225] If an exemption given to a free exercise claim were also given to parallel speech claims, then an effectively neutral position would be maintained with respect to religion, guaranteeing equal treatment of all manifestations of dissent to laws of general applicability. Interestingly, this would implement Professor Kurland's neutrality approach[226] while combating critics

224. *See supra* notes 58-60 and accompanying text. A constitutional definition of religion may still be required in establishment cases, but avoiding it in matters implicating free exercise would eliminate personal inquiries and cross-examination of an individual's beliefs. Whether or not a matter is religious would be evaluated in the abstract and not with reference to thought processes peculiarly personal to the individual. *See generally* Engel v. Vitale, 370 U.S. 421 (1963) (twenty-one word prayer composed by the state deemed to be religion). Eliminating the necessity of defining religion in the free exercise context would also reduce the conflict between the religion clauses, which has led some to advocate that religion be defined differently in establishment clause cases than in free exercise clause cases. *See* L. TRIBE, *supra* note 65, § 14-6, at 828-29. A broad definition of religion in free exercise cases has led to unduly restrictive establishment clause results. *See* Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) (teaching of transcendental meditation in the public schools held to violate the establishment clause).

225. For a sampling of the commentaries attempting to reconcile the religion clauses, see M. KONVITZ, *supra* note 213; P. KURLAND, RELIGION AND THE LAW (1962); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673 (1980); Galanter, *Religious Freedoms in the United States: A Turning Point?,* 1966 WIS. L. REV. 217; Giannella, *Religious Liberty, Nonestablishment, and Doctrine Development Part II. The Nonestablishment Principle,* 81 HARV. L. REV. 513 (1968).

226. Professor Kurland argues that the two religion clauses are reconciled under a single neutrality principle which provides that governmental actions based on secular purposes are permissible under both clauses, notwithstanding any incidental effects upon religion. Under Professor Kurland's approach, religious beliefs afford no special exemption from laws of general applicability, and

who have suggested that his neutrality approach minimizes the individual freedom protected by the free exercise clause.[227] Under the standards set forth in free expression cases, religious rights would be protected by the compelling state interest test. If the state's interest in regulating the activities in question is not compelling, then the state regulation fails. At the same time, since no exemption is created solely for religious activity, the result would satisfy Professor Kurland's test that religion may not be used as a basis of classification for purposes of governmental action.[228] Furthermore, the so-called tension between the establishment and free exercise clauses would be eliminated. If special exemptions were not granted to activities undertaken in the name of religion, then there would be no question of establishment.

Despite the benefits to religious liberty in eliminating the need for an inquiry into sincerity, and definitional and establishment problems in free exercise cases, there is no question that some religious claims protected under the Court's current approach may go unvindicated. Because of the narrower definition accorded religious conscience, for example, it is likely that *Sherbert* would have had to be decided differently.

The proposed approach has other ramifications. For example, if there could be no judicially created exemptions for religious activities solely on free exercise grounds, this would mean that the exemption granted in *Wisconsin v. Yoder*[229] to those expressing religious opposition to compulsory education could not be granted unless people with secular objections would be similarly excused. Using this approach may result in a limitation of free exercise rights in some instances, although the same constitutional test, the "compelling state interest" test, has been used by the Court in both free expression and free exercise cases.[230] The application of the same test will not, however, always lead to the same results.

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thus free exercise does not provide any special protection which might implicate establishment clause concerns. *See* P. KURLAND, *supra* note 225, at 112; Kurland, *supra* note 17, at 24. For a sampling of the commentary supporting Kurland's thesis, see Giannella, *supra* note 225, at 527; Weiss, *supra* note 21, at 617-18.

227. *See* Choper, *supra* note 225; Merel, *supra* note 59.

228. P. KURLAND, *supra* note 225, at 112.

229. 406 U.S. 205 (1972).

230. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963) (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)). *See also* Merel, *supra* note 59, at 821 (state interference with free exercise clause permitted only when essential for the accomplishment of an essential state purpose).

For example, if in *Thomas* the state was required to grant an exemption to everyone who objected to working in an armaments factory, it undoubtedly would be faced with a far greater number of claimants than if the exemption were limited to those opposed to armaments work solely on religious grounds. The fact that more people would be seeking such exemptions would create profound difficulties in educational administration, in fiscal integrity, and in investigation of potentially insincere claims. Such increased difficulties might render the state interest in denying the exemption more compelling. That is, while the state's interest might not be compelling with respect to one or a limited number of potential claimants, it might be compelling with respect to a large number of potential claimants. Thus, under the standard posited here, an exemption might be denied, while it might have been allowed if the standard only permitted exemptions based on religious conscience.

The denial of an exemption because of the breadth of the class potentially subject to exclusion may actually have occurred in *Heffron v. International Society for Krishna Consciousness, Inc.*[231] In that case, the plaintiffs sought an exemption from a rule that required all persons to solicit funds or distribute literature only from designated booth spaces at the Minnesota State Fair. The Minnesota Supreme Court found the state's interest in limiting this activity to booths not compelling when measured against the free exercise interests of the limited number of Krishnas who sought to solicit on the fairgrounds.[232] After the plaintiffs argued that the exemption from booth space must be granted to everyone exercising speech rights, the United States Supreme Court reached a different result.[233] Instead of the possibility of accommodating only a handful of peripatetic solicitors, the state was then faced with the possibility of thousands of people seeking funds or distributing literature throughout the fairgrounds. The specter of this possibility added to the state's argument that it had a compelling interest in reducing congestion and in limiting fraud by restricting all solicitations to booth spaces.

It is submitted, however, that even if the posited analysis restricts free exercise in circumstances such as that in *Heffron*, this minimal restriction is far outweighed by the principles of

231. 452 U.S. 640 (1981).

232. International Soc'y for Krishna Consciousness, Inc. v. Heffron, 299 N.W.2d 79, 81 (Minn. 1980).

233. *See* 452 U.S. at 652-54.

equal liberty of expression and conscience that underlie the proposed theory. Moreover, the approach eliminates most of the more severe jurisprudential difficulties that have plagued free exercise analysis. Finally, as has been shown, the proposed approach does not result in a substantial reduction in the protection afforded religious activities, and indeed has been foreshadowed by religious liberty cases.

CONCLUSION

Interpretation of the free exercise clause has proved to be especially troublesome for the Supreme Court. Surprisingly, however, neither the Court nor commentators have looked to the first amendment's other freedom, the freedom of expression, as a guidepost in examining the parameters of the free exercise guarantee. This failure to link the first amendment clauses has occurred even though the cases have clearly demonstrated that the interests protected by free exercise can be, and indeed have been, protected under the free speech clause. In short, the Court's jurisprudence has already established that there is no constitutionally definable interest protected by the free exercise clause that is not simultaneously protected to some extent by the free expression clause.

At the same time, there is at least an implication in the cases that the freedom of conscience, although in some instances protected as speech and in others as free exercise, may receive a broader protection under the guarantee of religious freedom. It has also been suggested that even when the Court has acknowledged that freedom of expression and free exercise overlap, a more stringent protection may be required for those expressing religious interests than for those expressing secular claims. Policy reasons and an analysis of the cases suggest that neither of these results is warranted.

The analysis posited by this Article is straightforward. Any judicially created exemption granted to those expressing a religious interest may be constitutionally required only when such an exemption would be similarly required for those expressing parallel free speech claims. Although this approach might tend to limit the scope of the free exercise protection in some instances, it would simplify free exercise analysis by removing problems of definition and inquiry into sincerity. It would also promote neutrality in church-state relations because religious ideas would never be accorded favored status. Similarly, it would eliminate the establishment clause problems associated

with the current free exercise test, and would recognize that the freedoms of the first amendment are cohesive and unitary. Freedom of expression necessarily affects freedom of religious exercise and freedom of religious exercise necessarily affects freedom of expression. This cohesive interpretation of the first amendment freedoms first appeared in the Jehovah's Witnesses cases of the 1930's and 1940's, but apparently has been forgotten since. The approach set forth in those cases should again be followed in free exercise analysis.